No. 87-5468-CSH Title: Samuel Bice Johnson, Petitioner
Status: GRANTED v.
CAPITAL CASE Mississippi

Docketed: Court: Supreme Court of Mississippi
September 14, 1987

Counsel for petitioner: Sorkin,Laurence T.

Counsel for respondent: White,Marvin

NOTE: CAPITAL CASE

Entry	Date	Note	Proceedings and Orders
1	Sep 14 1987	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	Oct 19 1987		Order extending time to file response to petition until November 16, 1987.
5	Oct 20 1987		Brief amicus curiae of New York filed.
6	Nov 16 1987		Brief of respondent Mississippi in opposition filed.
7	Nov 23 1987		Reply brief of petitioner Samuel R. Johnson filed.
8	Nov 25 1987		DISTRIBUTED. December 11, 1987
10	Dec 18 1987		REDISTRIBUTED. January 8, 1988
12	Jan 11 1988		Petition GRANTED. limited to Questions 1 and 2 presented by the petition.
			**********
13	Feb 19 1988		Joint appendix filed.
17	Feb 24 1988	G	Motion of Mississippi Public Defenders' Association for leave to file a brief as amicus curiae filed.
14	Feb 25 1988		Brief of petitioner Samuel R. Johnson filed.
15	Feb 25 1988		Brief amicus curiae of New York filed.
16	Feb 25 1988	G	Motion of Committee on Civil Rights of the Association of the Bar of the City of New York for leave to file a brief as amicus curiae filed.
19	Mar 7 1988		Motion of Committee on Civil Rights of the Association of the Bar of the City of New York for leave to file a brief as amicus curiae GRANTED.
22	Mar 11 1988		SET FOR ARGUMENT, Monday, April 25, 1988. (3rd case).
21	Mar 21 1988		Motion of Mississippi Public Defenders' Association for leave to file a brief as amicus curiae GRANTED.
23	Mar 25 1988		Brief of respondent Mississippi filed.
24	Mar 31 1988		CIRCULATED.
26	Apr 16 1988	X	Reply brief of petitioner Samuel B. Johnson filed.
27	Apr 25 1988		ARGUED.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

No. 87-5468

Supreme Court, U.S.
FILED
SEP 14 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

SAMUEL BICE JOHNSON,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

Clive A. Stafford Smith
SOUTHERN PRISONERS' DEFENSE COMMITTEE
185 Walton Street, N.W.
Atlanta, Georgia 30303
(404) 688-1202

Laurence T. Sorkin*
Anthony Paduano
CAHILL GORDON & REINDEL
(a partnership including professional corporations)
80 Pine Street
New York, New York 10005
(212) 701-3000

Attorneys for Petitioner
Samuel Bice Johnson

*Counsel of Record

September 14, 1987

QUESTIONS PRESENTED

1. In a death case where the principal aggravating circumstance relied on at sentencing was a 20-year-old out-of-state conviction, whether the subsequent invalidation of that conviction -- when there was no other evidence to support that aggravating circumstance -- requires reversal of petitioner's death sentence?

2. Whether the Mississippi Supreme Court's refusal to recognize the judgment of the New York Court of Appeals vacating petitioner's 1963 conviction violates the full faith and credit clause of the Constitution?

3. Whether, on the facts of this case, the "especially heinous, atrocious or cruel" aggravating circumstance is unconstitutionally vague when (a) petitioner was not the triggerman but was tried and convicted as an aider and abettor; (b) the triggerman was tried and convicted by a different jury and was not sentenced to death; and (c) the trial judge did not instruct the jury on what the "especially heinous, atrocious or cruel" aggravating circumstance meant or how to apply it, and the Mississippi Supreme Court applied no limiting construction?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	4
STATEMENT OF FACTS	5
A. The Mississippi Trial	6
B. The Proceedings in New York	10
C. The Mississippi Supreme Court's Decision Denying Post-Conviction Relief	11
REASONS FOR GRANTING THE WRIT	13
I. THE DECISION OF THE MISSISSIPPI SUPREME COURT UPHOLDING PETITIONER'S DEATH SENTENCE FOLLOWING THE INVALIDATION OF THE PRINCIPAL AGGRAVATING CIRCUMSTANCE CONFLICTS WITH THIS COURT'S PRECEDENTS	15
II. THE REFUSAL OF THE MISSISSIPPI SUPREME COURT TO RECOGNIZE THE JUDGMENT OF THE NEW YORK COURT OF APPEALS VACATING PETITIONER'S 1963 NEW YORK CONVICTION VIOLATES THE FULL FAITH AND CREDIT CLAUSE OF THE CONSTITUTION	22
III. THE FAILURE IN THIS CASE EITHER TO INSTRUCT THE JURY ABOUT THE MEANING OF THE "ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL" AGGRAVATING CIRCUMSTANCE AS APPLIED TO AN AIDER OR ABETTOR OR TO PLACE ANY LIMITING CONSTRUCTION UPON THE STATUTORY LANGUAGE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS	24
CONCLUSION	28
APPENDIX	
Johnson v. State, DP No. 43 (Miss. May 27, 1987) (opinion of Mississippi Supreme Court denying motion for post-conviction relief)	1a

Johnson v. State, DP No. 43 (Miss. July 15, 1987) (order denying motion for rehearing) 24a

Johnson v. State, 477 So. 2d 196 (Miss. 1985) (opinion of Mississippi Supreme Court affirming conviction and death sentence on direct appeal) 25a

People v. Johnson, 69 N.Y.2d 339, 506 N.E.2d 1177, 514 N.Y.S.2d 324 (N.Y. 1987) (per curiam) 53a

People v. Johnson, 125 A.D.2d 1008, 509 N.Y.S.2d 789 (4th Dep't 1986) 55a

People v. Johnson (4th Dep't Dec. 12, 1986) (order denying rehearing) 56a

People v. Johnson, Index No. 32/63 (County Ct. Monroe Ct. Oct. 29, 1986) (order resentencing Johnson to permit direct appeal and denying all other post-conviction relief) 57a

TABLE OF AUTHORITIES

Cases — Page

Baldwin v. Alabama, 472 U.S. 372 (1985) 17

Burgett v. Texas, 389 U.S. 109 (1967) 15n

Burrell v. McMann, 51 Misc. 2d 185, 273 N.Y.S.2d 9 (Sup. Ct. Clinton Co. 1966) 21

Cartwright v. Maynard, 822 F.2d 1477 (10th Cir. 1987) 13, 14, 19, 26

Coleman v. State, 378 So. 2d 640 (Miss. 1979) 25n

Douglas v. California, 372 U.S. 353 (1963) 10

Estelle v. Smith, 451 U.S. 454 (1981) 15n, 18

Farmland Dairies v. Barber, 65 N.Y.2d 51, 478 N.E.2d 1314, 489 N.Y.S.2d 713 (1985) 21n

Furman v. Georgia, 408 U.S. 238 (1972) 24

Gardner v. Florida, 430 U.S. 349 (1977) .....

Godfrey v. Georgia, 446 U.S. 420 (1980) 26

Gray v. Lucas, 677 F.2d 1086 (5th Cir. 1982) 25n

Hall v. State, 241 Ga. 252, 244 S.E.2d 833 (1978) 24n

Hampton v. McConnell, 16 U.S. (3 Wheat) 234 (1818) 20

Jackson v. Denno, 378 U.S. 368 (1964) .....

Johnson v. Muelberger, 340 U.S. 581 (1951) 21

Johnson v. State, 477 So. 2d 196 (Miss. 1985), cert. denied, 106 S. Ct. 1958, reh'g denied, 106 S. Ct. 2930 (1986) ..... passim

Johnson v. Thigpen, 806 F.2d 1243 (5th Cir. 1986), cert. denied, 107 S. Ct. 1618 (1987) 25n

Kellogg v. State, 504 P.2d 440 (Okla. Crim. App. 1972) 21n

Lindsey v. Smith, 820 F.2d 1137 (11th Cir. 1987) 19n

Loper v. Beto, 405 U.S. 473 (1972) 15n

Cases	Page
Milliken v. Meyer, 311 U.S. 457 (1940)	22
Mississippi State Bar v. Phillips, 385 So. 2d 943 (Miss. 1980)	21n
People v. Huntley, 15 N.Y.2d 72, 204 N.E.2d 179, 255 N.Y.S.2d 838 (1965)	7n
People v. Johnson, 69 N.Y.2d 339, 506 N.E.2d 1177, 514 N.Y.S.2d 324 (1987), rev'g 125 A.D. 2d 1008, 509 N.Y.S.2d 789 (4th Dep't 1986)	2, 10
People v. Montgomery, 24 N.Y.2d 130, 247 N.E.2d 130, 299 N.Y.S.2d 156 (1969)	22
People v. Rivera, 39 N.Y.2d 519, 349 N.E.2d 825, 384 N.Y.S.2d 726 (1976)	22
People v. Waterman, 9 N.Y.2d 561, 175 N.E.2d 445, 216 N.Y.S.2d 70 (1961)	
People v. Willis, 79 A.D.2d 1036, 435 N.Y.S.2d 38 (2d Dep't 1981)	21n
Phillips v. State, 421 So. 2d 476 (Miss. 1982)	9, 15
Profitt v. Florida, 428 U.S. 242 (1976)	25, 25n
Ritter v. Smith, 726 F.2d 1505 (11th Cir.), cert. denied, 469 U.S. 869 (1984), vacated on other grounds, 811 F.2d 1398 (11th Cir.), cert. denied, 107 S. Ct. 3242 (1987)	19
Ruiz v. Lockhart, 806 F.2d 158 (8th Cir. 1986)	13, 19
Slater v. State, 316 So. 2d 539 (Fla. 1975)	
Smith v. Murray, 106 S. Ct. 2661 (1986)	14n, 18, 20
Smith v. Procunier, 769 F.2d 170 (4th Cir. 1985), cert. denied sub nom., Smith v. Sielaff, 106 S. Ct. 245, aff'd on other grounds sub nom., Smith v. Murray, 106 S. Ct. 2661 (1986)	19
Townsend v. Burke, 334 U.S. 736 (1948)	12, 16, 17
Underwriters National Assurance Co. v. North Carolina Life & Accident & Health Insurance Guaranty Ass'n, 455 U.S. 691 (1982)	20
United States v. Tucker, 404 U.S. 443 (1972)	12, 15-16, 17
Wheat v. Thigpen, 793 F.2d 621 (5th Cir. 1986), cert. denied, 107 S. Ct. 1566 (1987)	15n

Cases	Page
Wilson v. Butler, 813 F.2d 664 (5th Cir.), rehearing granted, Slip. op. at 6 (5th Cir. August 17, 1987) (available on LEXIS, GENFED Library)	19
Wisconsin v. Pelican Insurance Co., 127 U.S. 265 (1888)	21n
Ex parte Wolfson, 30 Cal. 2d 20, 180 P.2d 326 (1947)	21n
Woodard v. Sargent, 806 F.2d 153 (8th Cir. 1986)	13, 19
Zant v. Stephens, 462 U.S. 862 (1963)	11-12, 15, 15n, 16-17, 18, 18n
Constitutional Provisions	
U.S. Const. Art. IV, § 1	2
U.S. Const. Amend. VIII	2
U.S. Const. Amend. XIV, § 1	2-3
Statutes	
Judicial Code	
28 U.S.C. § 1257(3) (1982)	2
28 U.S.C. § 1738 (1982)	20
Miss. Code Ann.	
§ 97-3-19(2) (Supp. 1986)	8n
§ 99-19-101 (Supp. 1986)	3, 8n, 19n, 24
§ 99-19-101(5)(b) (Supp. 1986)	7
§ 99-19-101(5)(e) (Supp. 1986)	9
§ 99-19-101(5)(h) (Supp. 1986)	9
§ 99-39-1 et seq. (Supp. 1986)	4
N.Y. Penal Law	
§ 120.05 (McKinney 1975 & Supp. 1975-86)	7
§ 243 (repealed 1967)	7
§ 244 (repealed 1967)	7
Other Authorities	
R. Rosen, The "Especially Heinous" Aggravating Circumstance in Capital Cases - The Standardless Standard, 64 N.C.L. Rev. 941 (1986)	25

No. 87-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

SAMUEL BICE JOHNSON,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF MISSISSIPPI

Petitioner Samuel Bice Johnson respectfully prays that a writ of certiorari issue to review the judgment of the Mississippi Supreme Court entered on May 27, 1987.

OPINIONS BELOW

The opinion and order of the Mississippi Supreme Court denying Johnson's motion for post-conviction relief is not yet officially reported; it is reprinted at pages 1a-23a of the Appendix to this petition. The order of the Mississippi Supreme Court denying Johnson's petition for rehearing is unreported; it is reprinted at page 24a of the Appendix. The opinion of the Mississippi Supreme Court affirming Johnson's 1982 conviction and sentence on direct appeal is reported at Johnson v. State, 477 So. 2d 196 (Miss. 1985), and is reprinted at pages 25a-52a of the Appendix.

The decision of the New York Court of Appeals reversing Johnson's 1963 conviction for assault in the second degree and dismissing the underlying indictment is reported at People v. Johnson, 69 N.Y.2d 339, 506 N.E.2d 1177, 514 N.Y.S.2d 324 (1987) (per curiam), and is reprinted at pages 53a-54a of the Appendix. The opinion of the New York Supreme Court, Appellate Division, Fourth Department denying Johnson's motion to vacate his 1963 conviction is reported at People v. Johnson, 125 A.D.2d 1008, 509 N.Y.S.2d 789 (4th Dep't 1986), and is reprinted at page 55a of the Appendix; that court's order denying rehearing is reprinted at page 56a of the Appendix. The opinion of the County Court for Monroe County resentencing petitioner but otherwise denying post-conviction relief is unreported; it is reprinted at pages 57a-61a of the Appendix.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3) (1982). The judgment of the Mississippi Supreme Court denying Johnson's motion for post-conviction relief was entered on May 27, 1987. A timely motion for rehearing was filed on June 11, 1987 and was denied by the Mississippi Supreme Court on July 15, 1987.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Art. IV, § 1:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State; and the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.

U.S. Const. Amend. VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. Amend XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 1738 (1982): State and Territorial statutes and judicial proceedings; full faith and credit.

* * *

> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court and that the said attestation is in proper form.
>
> Such Acts, records, and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

Miss. Code Ann. § 99-19-101 (Supp. 1986): Jury to determine punishment in capital cases in separate sentencing proceeding; aggravating and mitigating circumstances to be considered.

* * *

> (5) Aggravating circumstances shall be limited to the following:
>
> * * *
>
> (b) The defendant was previously convicted of another capital offense or of a felony involving the use or threat of violence to the person.
>
> * * *
>
> (e) The capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
>
> * * *
>
> (h) The capital offense was especially heinous, atrocious or cruel.
>
> * * *

STATEMENT OF THE CASE

Johnson was tried and convicted of capital murder in Pike County, Mississippi in 1982 and sentenced to death. His conviction and sentence were affirmed on direct appeal by the Mississippi Supreme Court. Johnson v. State, 477 So. 2d 196 (Miss. 1985) (24a-52a). He petitioned this Court for a writ of certiorari, which was denied. Johnson v. Mississippi, 106 S. Ct. 1958 (1986) (Brennan and Marshall, JJ., dissenting). His petition for rehearing was also denied. Johnson v. Mississippi, 106 S. Ct. 2930 (1986).

On August 4, 1986 Johnson filed a motion for post-conviction relief under the Mississippi Uniform Post-Conviction Relief Act, Miss. Code Ann. §§ 99-39-1 et seq. (Supp. 1986). The Mississippi Supreme Court granted a stay of execution to permit him to pursue his state law post-conviction remedies. On March 24, 1987 the New York Court of Appeals reversed Johnson's 1963 New York conviction for second degree assault, which had been relied on at sentencing at the 1982 Mississippi trial.

On May 27, 1987 the Mississippi Supreme Court, by a 6-3 vote, denied Johnson's motion for post-conviction relief and set a new execution date of July 22, 1987.

On June 4, 1987 petitioner filed a motion with the Mississippi Supreme Court seeking a stay of execution to permit him to file a timely petition for certiorari with this Court. On June 11, 1987, while that motion was pending, Johnson filed a motion for rehearing. On July 13, 1987 the Mississippi Supreme Court granted a stay of execution to permit Johnson to

seek review of its May 27, 1987 decision in this Court. On July 15, 1987 the Mississippi Supreme Court denied Johnson's motion for rehearing without opinion.

STATEMENT OF FACTS

In 1963 Johnson, a black man who was then 21 years old, was convicted of second degree assault in the County Court for Monroe County, New York. He was sentenced to 1 to 3 years in jail, served one year and was paroled for good behavior. In 1982 Johnson was tried in Pike County, Mississippi and convicted of capital murder on an aiding and abetting theory in connection with the death of a white State Highway Patrolman. The 1963 New York conviction was introduced and relied upon as the principal aggravating circumstance at the sentencing phase of Johnson's Mississippi trial.

Johnson was not the triggerman, a fact conceded by the State (R. 2277)[1] and acknowledged by the Mississippi Supreme Court on direct appeal. Johnson v. State, 477 So. 2d at 206-07 (35a). The triggerman and another accomplice, each of whom was separately tried and convicted, were sentenced to life imprisonment; a third accomplice, who testified for the State, was sentenced to 25 years in jail. Only Johnson was sentenced to death.

After his conviction was affirmed on direct appeal, Johnson commenced a proceeding in Mississippi for post-conviction relief. One of the issues raised in his petition for post-conviction relief was the impermissible use of the

1 "R.____" references are to the record on direct appeal of Johnson's 1982 Mississippi trial.

1963 New York conviction at sentencing. While his petition was pending before the Mississippi Supreme Court, the New York Court of Appeals, that state's highest court, reversed his 1963 New York conviction on constitutional grounds. Despite that reversal, the Mississippi Supreme Court, with three judges dissenting, denied Johnson's motion for post-conviction relief (16a).

A. The Mississippi Trial

Johnson was one of four men implicated in the death of a Mississippi Highway Patrolman, Billy Langham, who was shot to death on December 31, 1981. At his trial Johnson was represented by two court-appointed lawyers. Each had been out of law school for less than two years, and neither had previously tried a death case or any major criminal case.

Johnson was tried not as a principal, but only as an aider and abettor. The State's theory was that Johnson first stabbed Langham and then called out to the triggerman to shoot (R. 2272). However, at least three disinterested witnesses called by the State -- including a former police officer and the vice-president of a major oil company -- testified that the person who stabbed Langham was not Johnson, but another accomplice, Anthony Fields (R. 1298-99; 1326-27; 1332; 31a-33a).[2] The triggerman and the third accomplice testified at Johnson's trial, and they, too, identified Fields as the stabber (R. 1889, 2442). Apart from Fields's self-serving testimony,

2 In return for a 25-year prison term Fields agreed to cooperate with the state and testified as the prosecution's "star" witness at the trials of Johnson, the triggerman and the third accomplice.

no eyewitness identified Johnson as the stabber.[3] After a four-day trial Johnson was found guilty of capital murder (R. 2129).

At the sentencing hearing before the same jury, the Mississippi prosecutor introduced evidence that in 1963 Johnson had been convicted of second degree assault in Monroe County, New York. The Mississippi prosecutor made at least 22 references to Johnson's New York conviction (R. 2271-79; 2282-87) and used the conviction to argue that Johnson had been "previously convicted . . . of a felony involving the use or threat of violence to the person," an aggravating circumstance under Miss. Code Ann. § 99-19-101(5)(b) (Supp. 1986) (R. 2263-64). Johnson's lawyers objected to use of the New York conviction (R. 2196-97), but the objection was overruled (R. 2197).[4]

The only basis for introducing the 1963 New York conviction at Johnson's Mississippi trial was to prove a statutory aggravating circumstance. Johnson did not take the stand on his own behalf, and Mississippi does not otherwise permit a jury to consider a defendant's criminal record when it fixes his sentence for capital murder. At sentencing the Mississippi prosecutor repeatedly and wrongly characterized the New York conviction as one for "second degree assault with intent to commit first degree rape" (R. 2271-87) -- although there is not

---

3 On direct appeal the Mississippi Supreme Court held that, although of several eyewitnesses Fields alone implicated Johnson as the stabber, Fields's testimony was enough to create a question for the jury. Johnson v. State, 477 So. 2d at 207 (36a).

4 Johnson also attacked the use of the 1963 conviction on direct appeal. Johnson v. State, 477 So. 2d at 218-19 (48a).

and has never been any such a crime under New York law. See N.Y. Penal Law § 120.05 (McKinney 1975 & Supp. 1975-86) and N.Y. Penal Law §§ 243, 244 (repealed 1967).

After weighing the aggravating and mitigating circumstances, as required by the Mississippi capital sentencing statute, Miss. Code Ann. § 99-19-101 (Supp. 1986), the jury sentenced Johnson to death.[5] The jury was not permitted to know that both the triggerman and a second accomplice -- who had both been convicted of the same murder at earlier, separate trials -- received life sentences (R. 2135).

The invalid 1963 conviction was the critical piece of evidence at sentencing. Referring to that conviction some 22 times, mostly in terms of "rape," the Mississippi prosecutor told the jury:

- "[A] lot of good-hearted and well-meaning people who don't understand the purpose and the necessity of capital punishment will probably say that I'm very cold and harsh and cruel when I stand here and I say that because of having been convicted of second degree assault with intent to commit first degree rape and capital murder that Samuel Johnson should die." (R. 2276) (emphasis added)

- "What concerns me is what is going to happen the next time he decides to commit a second degree assault with intent to rape and what is going to happen the next time he decides he wants a Highway Patrolman or another law enforcement officer dead." (R. 2282) (emphasis added)

---

5 Under the Mississippi capital sentencing statute, there are two phases to a death penalty trial. In the guilt phase, the jury determines whether the defendant is guilty of capital murder and, therefore, death eligible. Miss. Code Ann. § 97-3-19(2) (Supp. 1986). In the sentencing phase, the same jury weighs the mitigating circumstances against the aggravating circumstances and decides whether the defendant should be sentenced to life imprisonment or death. Miss. Code Ann. § 99-19-101 (Supp. 1986).

- "When you vote to tell Judge Pittman that Samuel Johnson should suffer the penalty of death, you're going to be telling Samuel Johnson and others like him who commit second degree assault with the intent to commit first degree rape and who have a high potential for violence and who murder Highway Patrolmen and other innocent people when they're doing their jobs and going about their own business, you're going to be telling them that the people of our state have the courage to rid our state of people like that; that we don't want people like that in our state, especially when they have a violent record like that and the potentiality of hurting somebody else." (R. 2283) (emphasis added)

- "But it [a vote for death] will also stop Samuel Johnson from hurting anybody else and it will tell others like him that we don't reward people who commit second degree assault with the intent to commit first degree rape and who are returned to the penitentiary again and again and again and who have high potentiality for violent acts and who kill law officers who are doing their jobs." (R. 2286) (emphasis added)

- "You are not the one executing Samuel Johnson. Regardless of what they tell you, you're not the one. He chose that himself when he decided to be a criminal in 1963." (R. 2287) (emphasis added)

Except for his 1963 New York conviction, Johnson had no prior record of violent crime, and the State offered no other evidence in support of that aggravating circumstance. Although the jury found two other aggravating circumstances -- i.e., that the murder was "especially heinous, atrocious or cruel" (Miss. Code Ann. § 99-19-101(5)(h) (Supp. 1986)) and that it was committed to avoid arrest or to escape from custody (Miss. Code Ann. § 99-19-105(5)(e) (Supp. 1986) -- the prosecutor offered no evidence at sentencing to support these other aggravating circumstances (R. 2271-79; 2282-87). Except to read from the statutory language, the trial judge did not instruct the jury about any of the aggravating circumstances (R. 2264).

B. The Proceedings in New York

In his Mississippi petition for post-conviction relief Johnson contended that his 1963 New York conviction -- which stemmed from an incident involving his refusal to pay a prostitute for her services -- could not provide a basis for imposing the death penalty. Under Mississippi law, however, his 1963 conviction could be challenged only in the New York courts. Phillips v. State, 421 So. 2d 476, 481-82 (Miss. 1982). On July 30, 1986 Johnson's present attorneys applied for post-conviction relief in the County Court for Monroe County, New York, seeking to vacate the 1963 assault conviction.[6] In that application Johnson argued that his 1963 conviction was unconstitutional on at least three grounds and submitted affidavits supporting his claims, including one by a sitting Justice of the Supreme Court of the State of New York.[7] The Monroe County District Attorney opposed all relief sought by Johnson except for resentencing.[8]

---

6 Through numerous pro se applications, Johnson had sought unsuccessfully for nearly 14 years to have the 1963 conviction vacated on constitutional grounds.

7 The grounds for reversal were (1) that the conviction was obtained as the result of a purported confession made while in police custody, after indictment and without the presence of counsel (People v. Waterman, 9 N.Y.2d 561, 175 N.E.2d 445, 216 N.Y.S.2d 70 (1961)); (2) that no hearing was held on the voluntariness of the confession (Jackson v. Denno, 378 U.S. 368 (1964); People v. Huntley, 15 N.Y.2d 72, 204 N.E.2d 179, 255 N.Y.S.2d 838 (1965)); and (3) that Johnson was denied his right to take a direct appeal from the 1963 conviction (Douglas v. California, 372 U.S. 353 (1963); People v. Montgomery, 24 N.Y.2d 130, 247 N.E.2d 130, 299 N.Y.S.2d 156 (1969)).

8 The Monroe County District Attorney conceded that resentencing was appropriate only because the sentencing minutes and uncontradicted affidavits of disinterested parties established that Johnson had not been advised of his right to appeal.

On October 25, 1986 the County Court ordered that Johnson be resentenced to permit him to take a direct appeal from his 1963 conviction and otherwise denied his petition. In its order that court expressly found that petitioner had never been informed of his right to take an appeal, and that the affidavits submitted on his behalf raised appealable issues (59a). Johnson then appealed to the Appellate Division, Fourth Department, which held that he was procedurally barred from appealing his 1963 conviction (55a). On rehearing, the Appellate Division adhered to its earlier decision and denied relief (56a).

The New York Court of Appeals granted leave to appeal, and on March 24, 1987 that Court unanimously reversed the Appellate Division's order, vacated the 1963 conviction and dismissed the underlying indictment on the ground that Johnson had been denied his constitutional right to appeal. People v. Johnson, 69 N.Y.2d 339, 506 N.E.2d 324, 514 N.Y.S.2d 1177 (1987) (per curiam).

Johnson promptly notified the Mississippi Supreme Court that the New York Court of Appeals had vacated his 1963 conviction and filed with it a certified copy of the judgment of the Court of Appeals. He also filed a supplemental memorandum with the Mississippi Supreme Court reasserting his right to have his death sentence vacated in light of the decision by the New York Court of Appeals. The State of Mississippi submitted no papers in opposition.

C. The Mississippi Supreme Court's Decision Denying Post-Conviction Relief

On May 27, 1987 the Mississippi Supreme Court denied

Johnson's petition for post-conviction relief. Both the majority and the dissent recognized that the issue presented was one of first impression (see 5a and Op. of Robertson, J., dissenting, at 17a). Both opinions addressed the merits of Johnson's claim that his death sentence could not stand because it depended on a subsequently invalidated conviction that the State had heavily relied on in arguing to the jury for the death penalty.

In rejecting Johnson's claim, the majority held that the subsequent invalidation of Johnson's 1963 conviction was not "a basis to vitiate the [death] verdict of the jury" (6a). Initially, the majority noted that the jury had found three aggravating circumstances, and said "we have little doubt that in a rational sentencing process, Zant v. Stephens, [462 U.S. 862 (1983)], the other two aggravating circumstances would carry greater weight than the New York conviction in determining petitioner's sentence" (id.). Nonetheless, the majority stated that it "eschew[ed] 'harmless error'" in its reasoning because "the [Mississippi prosecutor] argued this particular aggravating circumstance as a reason to impose the death penalty" (id.). Next, the majority stated that "[i]f we adopted petitioner's argument, the State could never use a conviction as an aggravating circumstance, because of the extreme likelihood that a foreign state could overturn the prior conviction through collateral attack" (7a; emphasis added). Finally, the majority suggested -- citing nothing in the record -- that the decision of the New York Court of Appeals was not controlling on the Mississippi courts because the New York proceedings did not appear to be "truly adversarial" (8a). It went on to say that "the state's attorney in New York had no

significant interest or concern in vouchsafing the validity of [the] 1963 conviction" (id.), and that it was Mississippi, not New York, that "had the greatest interest in upholding the validity of [the] New York conviction" (id.).

Three justices dissented, arguing that where a prior conviction is "successfully" and "vigorously" argued by the prosecution as an aggravating circumstance (17a), resentencing is required "should the prior conviction ultimately be set aside" (20a). The dissenters criticized the majority for giving the decision of the New York Court of Appeals "less than full faith and credit" (19a) and argued that the invalidation of Johnson's 1963 conviction "undermines confidence in the outcome of the penalty phase of his capital murder trial" (23a).

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari and reverse the judgment below because the Mississippi Supreme Court has fundamentally misconstrued this Court's decision in Zant v. Stephens, 462 U.S. 862 (1983), and declined to follow its decisions in United States v. Tucker, 404 U.S. 443 (1972), and Townsend v. Burke, 334 U.S. 736 (1948). Tucker and Townsend hold that, even in non-death cases, a criminal sentence that rests on a prior conviction that is subsequently invalidated must be vacated. Zant reaffirms Tucker and Townsend and holds that, in death cases, the subsequent invalidation of an aggravating circumstance requires resentencing except where (a) the evidence submitted in support of the failed circumstance would have been otherwise admissible and (b) the particular statutory scheme for imposing capital punishment did not require the jury to weigh the invalid aggravating circumstance with other valid

aggravating and mitigating circumstances. Here, the prior violent felony conviction aggravating circumstance is supported only by evidence of an unconstitutional and now vacated prior conviction -- which the prosecutor repeatedly mischaracterized as a conviction for rape. The jury was expressly required to weigh that conviction in the balance when it decided whether to impose the death penalty.

The decision of the Mississippi Supreme Court is inconsistent with decisions of the Eight and Tenth Circuits which hold that, under Zant, a death sentence that is based on an invalid aggravating circumstance must be vacated where the sentencer weighed the invalid circumstance in fixing the sentence. Cartwright v. Maynard, 822 F.2d 1477, 1483 (10th Cir. 1987); Woodward v. Sargent, 806 F.2d 153, 156-57 (8th Cir. 1986); Ruiz v. Lockhart, 806 F.2d 158, 160 (8th Cir. 1986). The need for review in this case is made more compelling by the Mississippi Supreme Court's refusal to give full faith and credit to the judgment of the New York Court of Appeals vacating Johnson's 1963 conviction.

This Court should also grant certiorari and reverse the judgment below because, on the facts of this case, the "especially heinous, atrocious or cruel" aggravating circumstance relied on by the jury is unconstitutionally vague. We know of no other case where a defendant charged only as an aider and abettor was sentenced to death when no one else convicted of the same crime -- including the triggerman -- received a death sentence. Where a jury is allowed unbridled discretion to impose the death penalty because it is not told what "especially heinous, atrocious or cruel" means, and where

the state does not apply a limiting construction, see Johnson v. Thigpen, 806 F.2d 1243, 1247 (5th Cir. 1986), cert. denied, 107 S. Ct. 1618 (1987) (finding that the Mississippi Supreme Court has not consistently applied a limiting instruction of the "especially heinous, atrocious or cruel" aggravating circumstance), that death sentence violates the Eighth and Fourteenth Amendments and cannot stand. Cartwright v. Maynard, supra, 822 F.2d at 1483.

I.

THE DECISION OF THE MISSISSIPPI SUPREME COURT UPHOLDING PETITIONER'S DEATH SENTENCE FOLLOWING THE INVALIDATION OF THE PRINCIPAL AGGRAVATING CIRCUMSTANCE CONFLICTS WITH THIS COURT'S PRECEDENTS

The jury that sentenced Johnson to death would have perceived him very differently had it not been led to believe that he had been convicted in 1963 of "second degree assault with intent to commit first-degree rape" -- a void conviction for a non-existent crime. Evidence of that conviction was not admissible, and the State offered no evidence of any other violent felony conviction. The prosecutor's repeated references to the invalid 1963 conviction put before the jury a critical erroneous fact that could not have failed to affect its ultimate decision that Johnson should die.

This petition presents the issue on which this Court granted certiorari in Smith v. Murray, 106 S. Ct. 2661 (1986), cert. granted sub nom. Smith v. Sielaff, 106 S. Ct. 245 (1985), but did not reach -- the validity of a death sentence based, in part, on constitutionally inadmissible evidence. This petition also presents the issue on which this Court expressly reserved decision in Zant v. Stephens:

> "'The State of Georgia] acknowledges that, if an invalid statutory aggravating circumstance were supported by material evidence not properly before the jury, a different case would be presented. . . . We need not decide in this case whether the death sentence would be impaired in other circumstances, for example, if the jury's finding of an aggravating circumstance relied on materially inaccurate or misleading information." 462 U.S. at 887 n.24 (emphasis added).

Both issues are ripe for decision in this case, and certiorari should be granted.[9]

This Court has repeatedly held, even in non-death cases, that a sentence must be set aside if it is based on an unconstitutional prior conviction or "misinformation" of constitutional magnitude. In United States v. Tucker, 404 U.S. 443, 444-45 (1972), the defendant, after being sentenced in a non-capital case, succeeded in post-conviction relief proceedings in vacating two convictions -- one 15 years old and the other 9 years old -- that had been considered by the sentencer.[10] This Court noted that the "sentencing judge gave specific consideration to the respondent's previous convictions

---

9 In attacking his 1963 New York conviction before seeking post-conviction relief in Mississippi, Johnson followed the procedure established by the Mississippi Supreme Court in Phillips v. State, 421 So. 2d 476, 481-82 (Miss. 1982). See also Wheat v. Thigpen, 793 F.2d 621, 625 n.2 (5th Cir. 1986), cert. denied, 107 S. Ct. 1566 (1987). Johnson objected to use of the 1963 conviction both at trial (R. 2176-77) and on direct appeal (47a-48a), and the Mississippi Supreme Court fully addressed the merits of Johnson's claim (4a-9a).

10 Tucker is part of a long line of decisions by this Court holding that a conviction will be vacated when it is based in part on an unconstitutional prior conviction. See, e.g., Loper v. Beto, 405 U.S. 473, 483 (1972) (conviction vacated when unconstitutional prior conviction used to impeach defendant's credibility); Burgett v. Texas, 389 U.S. 109, 115 (1967) (conviction vacated because "admission of a prior criminal conviction which is constitutionally infirm" "is inherently prejudicial").

before imposing sentence upon him. Yet it is now clear that two of these convictions were wholly unconstitutional. . . ." 404 U.S. at 447 (footnote omitted). Despite the fact that the sentence was based also on other, valid convictions, this Court reversed, holding that but for his unconstitutional prior convictions, "the factual circumstances of the [defendant's] background would have appeared in a dramatically different light at the sentencing proceeding." 404 U.S. at 447-48.

In Townsend v. Burke, 334 U.S. 736, 741 (1948), this Court held that a conviction and sentence would be vacated where the defendant "was sentenced on the basis of assumptions concerning his criminal record which were materially untrue." There the sentencing court considered the defendant's numerous prior convictions but it attributed to him three convictions for crimes of which he had in fact been acquitted. This Court held that "[s]uch a result, whether caused by carelessness or design, is inconsistent with due process of law, and such a conviction cannot stand." 334 U.S. at 741.

As Justice (now Chief Justice) Rehnquist noted in his concurring opinion in Zant, "a more careful application of [the Tucker-Townsend rule] is appropriate in capital cases," and a defendant should prevail if he can show that the introduction of an invalid prior conviction "had an ascertainable and 'dramatic' impact on the sentencing authority." Zant v. Stephens, supra, 462 U.S. at 903. In this case, the now-vacated unconstitutional 1963 New York conviction was urged upon the jury by the state as the principal basis for returning a death verdict (R. 2282-87).

In Zant, this Court reaffirmed the rule that a sentence is unconstitutional and must be set aside when based on materially incorrect evidence not properly before the sentencer. Writing for the Court, Justice Stevens stated:

> "As we held in United States v. Tucker, 404 U.S. 443, 447-449 (1972), even in a noncapital sentencing proceeding, the sentence must be set aside if the trial court relied at least in part on 'misinformation of constitutional magnitude' . . . See Townsend v. Burke, 334 U.S. 736, 740-741 (1948) (reversing a sentence imposed on uncounseled defendant because it was based on 'extensively and materially false' assumptions concerning the defendant's prior criminal record)." 462 U.S. at 887 n.23.

Accord Baldwin v. Alabama, 472 U.S. 372, 382 (1986) ("a death sentence based upon consideration of 'factors that are constitutionally impermissible or totally irrelevant to the sentencing process . . .' would violate the Constitution" (quoting Zant, 462 U.S. at 885)); Estelle v. Smith, 451 U.S. 454 (1981) (death sentence must be vacated where constitutionally inadmissible evidence is relied on at the penalty phase). Cf. Gardner v. Florida, 430 U.S. 349, 362 (1977) (vacating death sentence where it may rest on "erroneous factual predicate").

The Court in Zant held that under the Georgia capital punishment scheme the constitutional invalidity of one aggravating circumstance did not require resentencing only because it found that all evidence before the jury was "fully admissible" and properly before it via introduction through another, valid aggravating circumstance. Zant, 462 U.S. at 886. The Court noted the Georgia Supreme Court's conclusion "that a different result might be reached if the failed [aggravating] circumstance had been supported by evidence not otherwise

admissible or if there was reason to believe that, because of the failure, the sentence was imposed under the influence of an arbitrary factor." 462 U.S. at 873.[11] In this case Johnson's death sentence rests on an aggravating circumstance that is invalid because the only evidence that supported it is the 1963 conviction that has been vacated on constitutional grounds.

The reading of Zant adopted by the court below is inconsistent with that of Justice Stevens, who wrote this Court's Zant opinion. In Smith v. Murray, supra, 106 S. Ct. at 2677, four members of this Court (Stevens, Marshall, Blackmun, and Brennan, JJ., dissenting) reached the Zant issue and stated:

> "We did not conclude [in Zant] . . . that any evidence concerning the invalid circumstances was simply irrelevant because the valid circumstances were, in all events, sufficient to support the death penalty. The fact that the record adequately establishes one valid aggravating circumstance may make the defendant eligible for the death penalty but it does not justify the conclusion that a death sentence should stand even though highly prejudicial inadmissible evidence was presented to the jury at the sentencing hearing. The introduction of such highly prejudicial, inadmissible evidence -- evidence that itself represents an independent constitutional violation -- quite clearly undermines the validity of the capital sentencing proceeding and violates the Eighth Amendment." (Stevens, J., dissenting)

The majority in Smith did not reach the Zant issue.

---

11 Unlike the Georgia capital sentencing statute, Mississippi's scheme requires that the jury weigh specific statutory aggravating circumstances against the mitigating circumstances. Miss. Code Ann. § 99-19-101 (Supp. 1986). The Zant Court stated that it did "not express any opinion concerning the possible significance of a holding that a particular aggravating circumstance is 'invalid' under a statutory scheme in which the judge or jury is specifically instructed to weigh statutory aggravating and mitigating circumstances in exercising its discretion whether to impose the death penalty." Zant, 462 U.S. at 890.

The courts of appeal are in conflict on the constitutionality of a death sentence based in part on consideration of an invalid aggravating circumstance. The Eighth and Tenth Circuits have held that the jury's consideration of an unconstitutional or invalid aggravating circumstance requires reversal of a death sentence even when other valid aggravating circumstances support the sentence. Cartwright v. Maynard, supra, 822 F.2d at 1483; Woodard v. Sargent, supra, 806 F.2d at 1560-57; Ruiz v. Lockhart, supra, 806 F.2d at 160 (8th Cir. 1986).

The Eleventh Circuit itself has split on the issue. In Ritter v. Smith, 726 F.2d 1505, 1517-19 (11th Cir.), cert. denied, 469 U.S. 869 (1984), vacated on other grounds, 811 F.2d 1398 (11th Cir.), cert. denied, 107 S. Ct. 3242 (1987), one panel held that under Zant a death sentence will be set aside if it rests on "constitutionally impermissible or totally irrelevant considerations." But a different Eleventh Circuit panel has read Zant for the rule that an invalid aggravating circumstance is subject to a harmless error analysis and a death sentence will stand when other constitutionally "sufficient" aggravating circumstances are present. Lindsey v. Smith, 820 F.2d 1137, 1154 (11th Cir. 1987).

The Fourth Circuit has also followed a harmless error reading of Zant, holding that a death sentence will stand if supported by at least one valid aggravating circumstance. Smith v. Procunier, 769 F.2d 170, 173 (4th Cir. 1985), aff'd on other grounds sub nom. Smith v. Murray, 106 S. Ct. 2661 (1986). The Fifth Circuit has read Zant to mean that an invalid statutory aggravating circumstance does not require that a death sentence be vacated when the evidence supporting the

aggravating circumstance is otherwise admissible. Wilson v. Butler, 813 F.2d 664, 677 (5th Cir.), rehearing granted, Slip op. at 6 (5th Cir. August 17, 1987) (available on LEXIS, GENFED Library).

This Court has previously granted certiorari to decide the issue presented by this petition, Smith v. Murray, supra, but found it unnecessary to reach the issue in that case. The lower courts are divided on the proper reading of Zant, and both the majority and the dissenters below characterized the issue as "novel" and one of first impression (5a, 17a). For these reasons, we submit that a writ of certiorari should issue in this case to decide whether a death sentence must be vacated when the principal aggravating circumstance on which it rests is an unconstitutional prior conviction that has been set aside.

II.

THE REFUSAL OF THE MISSISSIPPI SUPREME COURT TO RECOGNIZE THE JUDGMENT OF THE NEW YORK COURT OF APPEALS VACATING PETITIONER'S 1963 NEW YORK CONVICTION VIOLATES THE FULL FAITH AND CREDIT CLAUSE OF THE CONSTITUTION

The full faith and credit clause of the Constitution, U.S. Const. Art. IV § 1, obliged the Mississippi Supreme Court to recognize and respect the decision of the New York Court of Appeals vacating Johnson's 1963 conviction. See also 28 U.S.C. § 1738 (1982). The Mississippi court explicitly refused to do so.

This Court has long held that the forum state must lend "the same credit, validity, and effect" to a judgment as would "the state where it was pronounced." Underwriters

National Assurance Co. v. North Carolina Life & Accident & Health Insurance Guaranty Ass'n, 455 U.S. 691, 704 (1982) (quoting Hampton v. McConnell, 16 U.S. (3 Wheat.) 234, 235 (1818) (Marshall, C.J.)). Under New York law, the decision vacating Johnson's 1963 conviction rendered the 1963 indictment and all subsequent proceedings void ab initio. Burrell v. McMann, 51 Misc. 2d 185, 188, 273 N.Y.S.2d 9, 12 (Sup. Ct. Clinton Co. 1966) ("[b]y vacating the second judgment of conviction, that court declared that all proceedings relating thereto were a nullity"). The Mississippi Supreme Court declined to recognize the judgment of the New York Court of Appeals and flouted the constitutional command to give "judgments within the jurisdiction of the rendering state the same faith and credit in sister states as they have in the state of the original forum." Johnson v. Muelberger, 340 U.S. 581, 584 (1951) (footnote omitted).[12]

12 Although a state need not enforce a foreign penal judgment, the full faith and credit clause of the Constitution mandates that a state recognize a foreign state's criminal judgments. See Wisconsin v. Pelican Insurance Co., 127 U.S. 265, 291-92 (1888). See also Farmland Dairies v. Barber, 65 N.Y.2d 51, 56-57, 478 N.E.2d 1314, 1317, 489 N.Y.S.2d 713, 717 (1985) (New York recognized restrictions New Jersey placed on use of judgment convicting milk dealer of price rigging); Ex parte Wolfson, 30 Cal. 2d 20, 32, 180 P.2d 326, 333 (1947) (California must accord prior felony convictions in Pennsylvania full faith and credit in finding of habitual criminality). Indeed, the Mississippi Supreme Court has previously declared itself "bound to give full faith and credit to [criminal] judgments of our sister states." Mississippi State Bar v. Phillips, 385 So. 2d 943, 945 (Miss. 1980).

The constitutional command of full faith and credit extends to subsequent reversals of criminal judgments. See, e.g., People v. Willis, 79 A.D.2d 1036, 1037, 435 N.Y.S.2d 38, 39 (2d Dep't 1981) (New York court must recognize dismissal of Texas indictment entered after New York sentenced defendant as second felony offender; motion to vacate New York sentence granted); Kellogg v. State, 504 P.2d 440, 442 (Okla. Crim. App. 1972) ("Oklahoma could not choose to recognize one act of the sister-state, the conviction, and then ignore its subsequent act which nullified the conviction").

In denying post-conviction relief to Johnson, the Mississippi Supreme Court said it did not have to recognize the New York Court of Appeals decision because, in its view, the New York proceedings "lacked an essential adversarial ingredient" (8a) and because New York had no "significant interest" in upholding Johnson's New York conviction (id.). These accusations impugning the integrity of the New York judicial system are without basis in the record. The Mississippi Supreme Court's words attributing to the New York Court of Appeals a "motive" to "vitiate the death penalty verdict" in Mississippi when it vacated Johnson's 1963 New York conviction (7a) are equally without record support. The Court of Appeals followed its own sound precedents when it reversed Johnson's 1963 conviction. See, e.g., People v. Rivera, 39 N.Y.2d 517, 349 N.E.2d 825, 384 N.Y.S.2d 726 (1976) (reversing a 23-year old conviction where the defendant had not been advised of his right to appeal and the trial transcript was lost); People v. Montgomery, 24 N.Y.2d 130, 247 N.E.2d 130, 299 N.Y.S.2d 156 (1969). In any event, "the full faith and credit clause . . . precludes any inquiry into the merits of the cause of action, the logic or consistency of the decision, or the validity of the legal principles on which the judgment is based." Milliken v. Meyer, 311 U.S. 457, 462 (1940).

The Mississippi Supreme Court's refusal to accord full faith and credit to the judgment of the New York Court of Appeals that nullified Johnson's 1963 conviction on which his death sentence depends warrants review by this Court.

III.

THE FAILURE IN THIS CASE EITHER TO INSTRUCT THE JURY ABOUT THE MEANING OF THE "ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL" AGGRAVATING CIRCUMSTANCE AS APPLIED TO AN AIDER AND ABETTOR OR TO PLACE ANY LIMITING CONSTRUCTION UPON THE STATUTORY LANGUAGE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS

As this case shows, the "especially heinous, atrocious or cruel" aggravating circumstance does not serve to distinguish between murders that are punishable by death and those that are not. Johnson was tried and convicted as an aider and abettor and sentenced to death, while the triggerman was tried separately and received a life sentence. The judge at Johnson's trial did not tell the jury what the "especially heinous, atrocious or cruel" aggravating circumstance means or how to apply it. The only definition of "heinous" that the jury received was an utterly bogus -- and misleading -- explanation from the prosecutor.[13]

The trial judge's entire charge to the jury on the "especially heinous, atrocious or cruel" aggravating circumstance was as follows:

---

13 He told the jury in closing: ". . . I found out that the word 'heinous' means shockingly evil. Murder is an evil act. There'll be no argument with that from anybody, I don't think. Well, is the killing of a Highway Patrolman beside one of the busiest highways in our state shocking? Does it shock you to know that? It shocked me. Of course, you know what cruel means. To me, the cruelty of it has increased by the lack of necessity or justification" (R. 2274).

In the absence of any explanation of "heinous, atrocious or cruel" from the trial court, the jury could have taken the prosecutor's words to mean that it had but to conclude that the victim died beside "one of the busiest highways in our state" in order to sentence Johnson to death.

"Consider only the following elements of aggravation in determining whether the death penalty should be imposed, to-wit

1) That the Defendant, Samuel Johnson, was previously convicted of a felony involving the use or threat of violence to the person of another;

2) That the Defendant, Samuel Johnson, committed the capital murder for the purpose of avoiding arrest or effecting an escape from custody;

3) The murder was especially heinous, atrocious and cruel" (R. 2263-64).

The jury was given no guidance on how it should distinguish "especially heinous, atrocious or cruel" murders from all other murders. It was not told whether "especially heinous, atrocious or cruel" refers to the underlying crime itself or to petitioner's role as an aider and abettor. The jury was left to apply a standardless standard. See R. Rosen, The "Especially Heinous" Aggravating Circumstance in Capital Cases - The Standardless Standard, 64 N.C.L.R. 941 (1986). This failure to inform the jury, which is emphasized by the disparity between Johnson's death sentence and the life sentence the triggerman received, make that death sentence so freakish and unreliable as to constitute cruel and unusual punishment under Furman v. Georgia, 408 U.S. 238 (1972).[14]

The Mississippi Supreme Court neither required an appropriate limiting instruction by the trial court nor itself appplied any limiting construction of the kind that this Court

---

14 In Hall v. State, 241 Ga. 252, 244 S.E.2d 833 (1978), the Georgia Supreme Court held that a death sentence imposed upon an aider and abettor for the same crime in which the triggerman received a life sentence cannot stand. See also Slater v. State, 316 So. 2d 539 (Fla. 1975) (imposition of death penalty where co-defendant triggerman sentenced to life is unconstitutional under Furman).

in Profitt v. Florida, 428 U.S. 242 (1976), intimated is necessary to avoid vagueness problems.[15] Indeed, on Johnson's direct appeal the Mississippi Supreme Court came close to holding that every murder is, by definition, "especially heinous, atrocious and cruel":

"The very word 'murder' embraces within its meaning cruelty, brutality and an evil intent carried to the ultimate in harm: death. It is redundant to characterize a murder as cruel, brutal or malicious." Johnson v. State, supra, 477 So. 2d at 217.

In Godfrey v. Georgia, 446 U.S. 420, 428-29 (1980), this Court held that the "wanton or vile" aggravating circumstance was unconstitutionally vague because:

"There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.' . . . . [T]he trial judge's sentencing instructions . . . . gave the jury no guidance concerning the meaning of any of [the statutory] terms. In fact, the jury's interpretation of [the statutory aggravating circumstances] can only be the subject of sheer speculation."

In Cartwright v. Maynard, supra, 822 F.2d at 1491, a unanimous Court of Appeals for the Tenth Circuit, sitting

---

15 In Gray v. Lucas, 677 F.2d 1086 (5th Cir. 1982), cert. denied, 461 U.S. 910 (1983), the Fifth Circuit held that the "especially heinous, atrocious or cruel" aggravating circumstance -- as applied by the Mississippi courts -- was not unconstitutionally vague in that case because the Mississippi Supreme Court there had applied the limiting construction approved in Profitt v. Florida, supra, and had limited use of that aggravating circumstance to the "'conscienceless or pitiless crime which is unnecessarily torturous to the victim.'" Coleman v. State, 378 So. 2d 640, 648 (Miss. 1979). In Johnson v. Thigpen, supra, 806 F.2d at 1246, the Fifth Circuit held that the "especially heinous, atrocious or cruel" aggravating circumstance was unconstitutionally vague as applied in Mississippi.

en banc, held that Oklahoma's "especially heinous, atrocious or cruel" aggravating circumstance was unconstitutionally vague, even though the limiting instructions approved in Profitt had been given:

> "When the sentencer is free to rely upon any particular event that it believes makes a murder 'especially heinous, atrocious, or cruel,' the meaning that the sentencer attached to this provision 'can only be the subject of sheer speculation' . . . . The discretion of a sentencer [in such circumstances] is as complete and as unbridled as the discretion afforded the jury in Furman. No objective standard limits that discretion."

The Mississippi Supreme Court's decision in this case is in fundamental conflict with the Tenth Circuit's decision in Cartwright.

This Court should grant review to determine whether -- in this aiding and abetting case in which the death sentence depended in addition upon an unconstitutional and subsequently vacated prior conviction -- Mississippi's failure to define or limit the "especially heinous, atrocious or cruel" aggravating circumstance controverts Furman.

CONCLUSION

Petitioner respectfully requests that a writ of certiorari issue to review the judgment of the Supreme Court of Mississippi.

Dated: New York, New York
September 14, 1987

Respectfully submitted,

Clive A. Stafford Smith
SOUTHERN PRISONERS' DEFENSE COMMITTEE
185 Walton Street, N.W.
Atlanta, Georgia 30303
(404) 688-1202

Laurence T. Sorkin*
Anthony Paduano
CAHILL GORDON & REINDEL
(a partnership including professional corporations)
80 Pine Street
New York, New York 10005
(212) 701-3000

Attorneys for Petitioner
Samuel Bice Johnson

*Counsel of Record

APPENDIX

IN THE SUPREME COURT OF MISSISSIPPI

NO. DP-43

SAMUEL RICE JOHNSON

V.

STATE OF MISSISSIPPI

ON MOTION FOR POST-CONVICTION RELIEF

HAWKINS, PRESIDING JUSTICE, FOR THE COURT:

Samuel Rice Johnson filed a petition for relief under our Mississippi Uniform Post-Conviction Relief Act (CRA), Miss. Code Ann. § 99-39-1, et seq. We address only those assignments contemplated by the CRA for which we are authorized to review in a petition of this nature. For the reasons set forth, we deny his petition.

Following a trial held in the circuit court of Pike County on August 30-September 3, 1982, Samuel Rice Johnson was convicted of capital murder and sentenced to death. His conviction was affirmed by this Court on May 8, 1985, and h. petition for rehearing was denied November 6, 1985; Johnson v. State, 477 So.2d 196 (Miss. 1985). The United States Supreme Court denied his petition for certiorari, Johnson v. Mississippi, 106 S.Ct. 1958 (May 6, 1986), and subsequently denied his petition for rehearing, 106 S.Ct. 2930. (June 16, 1986)

On August 4, 1986, he filed with this Court his petition for relief under our Mississippi Uniform Post- Conviction Relief Act (CRA), Miss. Code Ann. § 99-39-1, et seq. His petition consists of 60 pages, supported by a brief of 85 pages, a supplemental motion to amend with supporting brief, and exhibits of several hundred pages. The petition contains

43 assignments, and the amendment to the petition adds another.[1]

The purpose of a CRA petition is set forth in Miss. Code Ann. § 99-39-3(2):

> (2) Direct appeal shall be the principal means of reviewing all criminal convictions and sentences, and the purpose of this chapter is to provide prisoners with a procedure, limited in nature, to review those objections, defenses, claims, questions, issues or errors which in practical reality could not be or should not have been raised at trial or on direct appeal.

Miss. Code Ann. § 99-39-21 reads in pertinent part:

> (1) Failure by a prisoner to raise objections, defenses, claims, questions, issues or errors either in fact or law which were capable of determination at trial and/or on direct appeal, regardless of whether such are based on the laws and the Constitution of the state of Mississippi or of the United States, shall constitute a waiver thereof and shall be procedurally barred, but the court may upon a showing of cause and actual prejudice grant relief from the waiver.
>
> * * * * *
>
> (4) The term "cause" as used in this section shall be defined and limited to those cases where the legal foundation upon which the claim for relief is based could not have been discovered with reasonable diligence at the time of trial or direct appeal.
>
> (5) The term "actual prejudice" as used in this section shall be defined and limited to those errors which would have actually adversely affected the ultimate outcome of the conviction or sentence. [Emphasis added]
>
> (6) The burden is upon the prisoner to allege in his motion such facts as are necessary to demonstrate that his claims are not procedurally barred under this section.

In a petition of this nature, we are also governed by Miss. Code Ann. § 99-39-27(5):

---

[1] Johnson was represented in his trial by Gerald Diaz and Gregory L. Harper of the Jackson Bar; on appeal to this Court by Kenneth J. Rose of the Atlanta Bar; in his petition to the United States Supreme Court by Clive A. Stafford Smith of the Atlanta Bar and in his present petition by Clive A. Stafford Smith of the Atlanta Bar and Laurence T. Sorkin and Anthony Paduano of the New York Bar.

> (5) Unless it appears from the face of the application, motion, exhibits and the prior record that the claims presented by such are not procedurally barred under section 99-39-21 and that they further present a substantial showing of the denial of a state or federal right, the court shall by appropriate order deny the application.

Moreover, we do not consider on a petition of this nature issues raised and decided on the original appeal, even though theories for relief different from those urged at trial and on appeal are now asserted. Miss. Code Ann. § 99-39-21(2), (3). Dufour v. State, 483 So.2d 307, 311 (Miss. 1985), (and cases cited therein).

Within these circumscribed boundaries, we address the appropriate assignments in Johnson's petition.

I.

JOHNSON'S 1963 NEW YORK CONVICTION AS AN AGGRAVATING CIRCUMSTANCE.

During the course of the sentencing phase of trial, the State introduced an authenticated copy of a judgment of conviction of Johnson of assault, second degree with intent to commit rape, first degree, rendered by the Monroe County court New York on April 9, 1963. This was offered as one of three aggravating circumstances to support the death penalty. (R.2171-2173). Johnson did not testify either at the guilt or sentencing phase of his trial.

During the course of his argument, the district attorney recited this conviction as a basis for the jury to render a death penalty verdict. (R.2273)

In his motion for a new trial and on appeal, Johnson objected to the introduction of the record of the conviction because it did not channel the jury's discretion by "clear and objective standards," and because it was too remote. (Appellant's Brief, pp.29-31) We rejected both arguments. 477 So.2d 218-219.

In his petition for certiorari to the U.S. Supreme Court, no claim of error was made to the introduction of this record into evidence as an aggravating circumstance.

In this petition, for the first time, Johnson argues that the 1963 conviction was invalid. Apparently, following or commensurate with its filing, Johnson's counsel also took steps to have this conviction vacated by the New York courts. This Court has been furnished with a copy of an order and slip opinion of the Court of Appeals of New York, dated March 24, 1987, in which that court did indeed reverse and vacate this 1963 conviction and dismiss the indictment.

From the exhibits it appears that Johnson did not appeal his 1963 conviction and that he served a year in a New York correctional institution for this crime.

Miss. Code Ann. § 99-19-101(5)(b) provides:

> (5) Aggravating circumstances shall be limited to the following:
>
> * * * * *
>
> (b) The defendant was previously convicted of another capital offense or of a felony involving the use of threat of violence to the person.

The aggravating circumstances enumerated in the court's instruction at trial were:

> (1) That the defendant, Samuel Johnson, was previously convicted of a felony involving the use or threat of violence to the person of another.
>
> (2) That the defendant, Samuel Johnson, committed the capital murder for the purpose of avoiding arrest or effecting an escape from custody.
>
> (3) The capital murder was especially heinous, atrocious and cruel.

(R.2236)

The verdict of the jury found all three of these aggravating circumstances existed. (R.2294)

It is apparent that Johnson waived this claim, and it is procedurally barred. At no time during his direct appeal, or

in his petition for certiorari to the U.S. Supreme Court did he argue his New York conviction was constitutionally invalid. Moreover, there is nothing to suggest he took any steps to vacate this conviction until he filed this petition. On appeal Johnson's counsel alleged thirteen assignments of error, and at Johnson's own urging, his counsel added seven additional assignments. None questioned the validity of his New York conviction. See Evans v. State, 485 So.2d 276 (Miss. 1986), at 280-281.

Also, the jury found three aggravating circumstances to support its verdict. Even if we conceded that the jury had no authority to consider this conviction, the remaining two aggravating circumstances were sufficient to support the jury's verdict. Kent v. Stephens, 462 U.S. 862, 77 L.Ed.2d 235, 252-254, 103 S.Ct. 2733 (1983); Irving v. State, 498 So.2d 305, 314 (Miss. 1986).

Aside from the statutory limitation of review, we remain unpersuaded by this contention.

We have never faced this question. A somewhat similar question has been before us concerning the use of a prior criminal conviction to impeach a defendant in a criminal trial. We have held that subsequent reversal on appeal of a prior conviction did not affect a defendant's trial conviction. Young v. State, 425 So.2d 1022 (Miss. 1983); Milstid v. State, 347 So.2d 1319 (Miss. 1977); and Nicholson v. State, 254 So.2d 881 (Miss. 1972).

Also, in Phillips v. State, 421 So.2d 476 (Miss. 1982), the state used a Kentucky conviction as a basis for Phillips' conviction under one of Mississippi's habitual criminal statutes. Miss. Code Ann. § 99-19-81 (Supp. 1984). We held that when the conviction was subsequently reversed, it could constitute a basis for post-conviction relief from the habitual criminal conviction.

Under Miss. Code Ann. § 99-19-81, however, upon proof of the prior conviction a circuit judge has no alternative except to sentence to the maximum authorized by law. Such sentence cannot be suspended, and the accused will never be eligible for parole or probation prior to serving this maximum sentence. In the sentencing phase of a capital murder trial the jury is not required to sentence the defendant to death, regardless of its finding.

When a prior conviction is used under either habitual offender statute, it is, of course, certain that the defendant will receive greater punishment. The admission of a prior conviction in order to impeach the accused as a witness, or at a sentencing phase of a capital murder trial may or may not materially influence the jury.

As we noted, the jury found three aggravating circumstances existed, and of the three we have little doubt that in a rational sentencing process Sant v. Stephens, supra, the other two aggravating circumstances would carry greater weight than the New York conviction in determining Johnson's sentence. Indeed, the remoteness in time of the prior conviction was a mitigating circumstance. Johnson v. State, 477 So.2d at 219.

We eschew "harmless error" in our reasoning, however, because the district attorney argued this particular aggravating circumstance as a reason to impose the death penalty. Johnson v. State, 477 So.2d at 219. Nevertheless, we reject New York's setting aside of the 1963 conviction as a basis to vitiate the verdict of the jury.

If there is one single point emphasized by the U.S. Supreme Court decisions of Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); and Furman v. Georgia, 408 U.S. 238, 92 S.Ct 2726, 33 L.Ed.2d 346 (1972), it is that before a jury is permitted to sentence

a human being to death, it must have clear guidelines. The centerpiece of these decisions requires the jury to find one or more aggravating circumstances exist before they can impose the death sentence. Of course, any such "aggravating circumstance" must reasonably justify making the difference between imposing a life sentence or the death penalty.

If the death penalty is to be imposed without caprice or chance, there is no doubt that a crucial guideline to assist citizens who have this formidable responsibility is whether the convicted murderer has engaged in serious criminal conduct involving violence to other people in the past. Thus, the reason for Miss. Code Ann. § 99-19-101(5)(b).

There is no question but that the state proved this aggravating circumstance in this case. At the time of Johnson's trial, New York had imposed a final conviction and Johnson had served his sentence.

If we adopted Johnson's argument, the state could never use a conviction as an aggravating circumstance, because of the extreme likelihood that a foreign state could overturn the prior conviction through collateral attack. The loss of this guideline to a jury would serve to return juries to the unbridled, unchannelled, and hence, unconstitutional discretion they had in imposing the death sentence.

We are not required in this case to go as far as Nicholson, Milstid and Young, supra, in authorizing introduction of proof of a prior conviction in a capital murder case. That is, in this case, we do not address whether a prior conviction can be used as an aggravating circumstance if that conviction is subsequently reversed on direct appeal. We do hold that a foreign state cannot vitiate the death penalty verdict in this state by setting aside a prior conviction of a violent crime through a collateral relief petition.

We deem it important to add in this case that there is no evidence or indication that the post-conviction relief proceedings in the New York courts were truly adversarial. Insofar as we can determine from Johnson's petition and exhibits, the state's attorney in New York had no significant interest or concern in vouchsafing the validity of his 1963 conviction, and we find no challenge by the state's attorney of New York of Johnson's petition. Other than Johnson, this state had the greatest interest in upholding the validity of his New York conviction. Yet, this state was not made a party to Johnson's petition and had no voice in any of the New York proceedings to vacate his conviction. Indeed, we know of no method whereby this state could have been made a party to the New York proceedings, and this state probably should not have been a party. This does not remove the fact that the proceedings lacked an essential adversarial ingredient. The New York courts are, of course, the final and proper arbiters of all judicial proceedings in that state, including the disposition of post-conviction petitions. Assuredly, by our view, we suggest no impropriety in the courts of that state taking whatever action they deem appropriate in a criminal case in New York. The fact remains that Johnson was convicted in 1963 by a New York court of a serious felony involving violence to a female for which he was imprisoned in that state. No New York court extended Johnson relief from his conviction before Johnson paid his debt to the state. If his crime was serious enough for him to be convicted and final enough for him to serve time in a penal institution, it had sufficient finality to be considered as an aggravating circumstance by a jury of this state. No death penalty verdict based upon this conviction need be vitiated by the subsequent relief granted more than twenty years later by the New York Court of Appeals.

We accordingly reject all assignments of Johnson's petition based upon his 1963 conviction in the State of New York.

II.

INEFFECTIVE COUNSEL

The only remaining assignments of Johnson not clearly procedurally barred are assignments VII and VIII wherein he claims his trial counsel were ineffective in their representation of him during the guilt and sentencing phases of his trial, thus depriving him of his Sixth Amendment right to assistance of counsel. Under the assignments he lists some forty instances in which he claims his lawyers did not render professional service guaranteed to him by the Sixth Amendment.

The Sixth Amendment states the accused has the right "to have the Assistance of Counsel for his Defense."

Literally hundreds of court decisions have grappled with this phrase since the U.S. Supreme Court in Powell v. State, 287 U.S. 45, 77 L.Ed. 158, 53 S.Ct. 55, 84 A.L.R. 527 (1932), announced the Sixth Amendment required something more than just having a person with a law license sitting at the counsel table with an accused. Also, Avery v. Alabama, 308 U.S. 444, 445, 84 L.Ed 377, 60 S.Ct. 32 (1940). A number of these cases are annotated and the various authorities examined in 4 A.L.R.4th 1 — 244 (1980); see also 1986 supplement.

In 1984 the U.S. Supreme Court in two seminal cases set forth guidelines to determine whether the constitutional guaranty had been met. U.S. v. Cronic, 466 U.S. 648, 80 L.Ed.2d 657, 104 S.Ct. 2039 (1984); and Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984).

Strickland tells us the benchmark inquiry is whether defense "counsel's conduct so undermined the proper

functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 692-693. It is an attack on the "fundamental fairness of the proceeding." Id. at 700. The Court then held the "proper standard for attorney performance is that of reasonably effective assistance," and it was incumbent upon a defendant to show that "counsel's representation fell below an objective standard of reasonableness. More specific guidelines are not appropriate." Id. at 693. Also, "judicial scrutiny of counsel's performance must be highly deferential," and "every effort be made to eliminate the distorting effects of hindsight." Id. at 694. The Court must then determine "whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." [Emphasis added] Id. at 695.

In addition, the accused must show he was prejudiced. That is, he must prove there is "a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." [Emphasis added] Id. at 698.

And finally, in determining whether ineffectiveness of counsel justifies setting aside a conviction, the appellate court may "independently weigh the evidence," and decide whether the aggravating and mitigating circumstances on balance warranted the death penalty.

This Court has followed the guidelines of Strickland in Irving v. State, 498 So.2d 305 (Miss. 1986); Evans v. State, 485 So.2d 276 (Miss. 1986); Dufour v. State, 483 So.2d 307 (Miss. 1985); Leatherwood v. State, 473 So.2d 964 (Miss. 1985); Lambert v. State, 462 So.2d 308 (Miss. 1984); Gilliard v. State, 462 So.2d 718 (Miss. 1985).

What then does "assistance of counsel" mean?

It obviously means an accused has the right to a lawyer to represent him. Just as obviously, it cannot mean there is a constitutional guaranty to a lawyer who in hindsight made no errors in defending the case. This would be tantamount to a constitutional guaranty of non-conviction. It would lend to continued court battles with successive defense lawyers, each of whom in hindsight could be found to have made mistakes. This never ending battle would continue until the state wearily threw in the towel. Covington v. State, 600 S.W.2d 186 (Mo.App. 1980); People v. Moody, 676 P.2d 691 (Colo. 1984); Commonwealth v. Saferian, 366 Mass. 89, 315 N.E.2d 878 (1974); State v. Wolf, 347 N.W.2d 573 (N.D. 1984).

Yet, if the Sixth Amendment guaranty has any meaning it must mean more than simply having a man admitted to law practice as a defense lawyer for the accused. U.S. v. Cronic, supra. It must mean that a lawyer with some competence conscientiously represented the accused. Dufour v. State, supra. It must require both, because an incompetent can be conscientious, and an otherwise competent lawyer can by a lack of concern for his responsibility, fail in his adversarial duty.

Yet it does not necessarily mean that a lawyer was either incompetent or failed to responsibly represent his client because he made mistakes. However, conduct of an attorney, including the mistakes he made, can very well be of such proportion as to reveal the lack of competence or diligence. Leatherwood v. State, supra.

Therefore, any Court seeking to determine whether the constitutional guaranty has been met, must look at the entire performance of the attorney and determine whether the defense attorney was competent and whether he sincerely tried to assist his client. In Dufour v. State, supra, at 310, we stated: "There are, however, certain basic duties required of an attorney when representing a criminal defendant."

Unless the stake or conduct was of such magnitude that the Court concludes the lawyer was incompetent or evidenced a failure to conscientiously fulfill his adversarial role, we will conclude the constitutional guaranty for performance of counsel as enunciated in Strickland has been met.

Admittedly, these criteria remain generalizations and subject to disagreement between lawyers and judges.

Nevertheless, the members of this Court have each had years to observe trial practice and procedure in this state, and each is able to pass judgment by studying a record to determine whether or not a particular attorney was both competent and had a responsible attitude in his client's defense of a lawsuit in this state.

Indeed, by studying a trial record an appellate judge cannot escape forming an opinion on the performance of trial counsel. The record in this case, contrary to Johnson's assertion, clearly reveals he was represented by competent counsel dedicated to his defense. We have again carefully reviewed the record, and our original view that he had competent, zealous counsel has been reinforced.

They most assuredly met the "reasonably effective assistance," and "wide range of professionally competent assistance," guidelines of Strickland. There clearly was no lack of competence, or failure of interest in their defense of Johnson to support the contention that the constitutional guaranty was not met.

III.

REFUSED MOTION FOR CONTINUANCE

For example, Johnson charges his counsel failed to properly move for a continuance, thereby depriving him of expert witnesses, M. Dale Mute and Stephen B. Halligan. These experts examined Johnson's and the other participants' homicide clothing, and studied the laboratory reports of the

state and Federal Bureau of Investigation. We have reviewed their letter to Diaz, Johnson's trial defense counsel, dated August 23, 1982, and we find nothing in this report which compels us to conclude that the defense counsel erred in not having these witnesses present at trial. These experts did not reach a conclusion so at odds with the state's proof so as to seriously challenge Johnson's guilt. Thus their absence from trial does not appear prejudicial.

It is just as plausible that their testimony would have been weak, and upon cross-examination their testimony would have helped the state's case. On the direct appeal of this case, we suspected Johnson's counsel moved for a continuance as a tactical gesture -- not really expecting the court to grant it -- but hoping that the circuit judge's refusal to grant the continuance would be considered error on appeal. It is not an altogether unfamiliar tactic of defense counsel in criminal as well as civil cases to produce an appeal record cluttered with adverse rulings. Some occasionally stick on appeal. The temptation to use this tactic increases in inverse proportion to the weakness of counsel's case.

IV.

WITHHOLDING OBJECTIONS TO CLOSING ARGUMENT

Of like import is Johnson's claim that his trial counsel were ineffective because they asked the trial judge to permit them to withhold objections to the state's argument until its completion and outside the presence of the jury. This clearly was a tactical decision of counsel. They, of course, knew they had the right to object whenever an improper argument was made. The very fact they made this request to the court evinced an awareness this right. Rather than risk offending the jury by objecting during argument, they asked permission to withhold objection and make it outside the presence of the jury. We criticized this sort of practice

because when an improper argument was in fact made, it did not give the circuit judge the opportunity to correct it promptly upon objection by opposing counsel.

A conscious choice of trial strategy by defense counsel which proves unfortunate is not to be equated with incompetency. Roe v. State, 95 Wis.2d 226, 290 N.W.2d 192 (1980); State v. Baker, 287 S.E.2d 497 (W.Va. 1982). Moreover, in our original opinion we found that the state did not make a prejudicial argument.

V.

FAILURE TO RAISE INVALIDITY OF 1963 CONVICTION

Johnson's claim that his counsel were ineffective for failing to inquire into the invalidity of 1963 conviction ignores the fact that Johnson did not take the stand in the sentencing phase of his trial to assert his innocence of the New York conviction, overlooks Johnson's failure to assert his innocence in the pro se document he filed with this Court on direct appeal, and disregards his counsel's failure to assert it in his appeal to this Court or in his petition for certiorari before the U.S. Supreme Court. He filed no such petition urging us to consider this issue as an additional assignment of error to those filed by his counsel.

VI.

REMAINING INEFFECTIVE ASSIGNMENTS

The remaining complaints Johnson makes of his trial counsel are a litany of Monday morning quarterbacking, attempts to again litigate issues decided, and assertions outside the record. All these fall far short of demonstrating his counsel were not reasonably effective.

The record in this case reveals that two dedicated, assidious trial attorneys did the best they could to defend

Johnson. Had the facts which pointed to Johnson's guilt not been overwhelming, his attorneys, no doubt, would have fared much better. In addition, the circuit judge, a jurist renowned for his patience, kindness and forbearance, more than lived up to his reputation in trying this case. No practicing attorney could hope for more consideration from a trial judge than these attorneys received in this case.

It is true we criticized defense counsel in our decision affirming Johnson's conviction for their manner of requesting a continuance, and by their request to withhold objections to the state's closing argument until its conclusion. But there was nothing about our comments to intimate that they harmed Johnson in doing so. To hold that Johnson's trial counsel, in this case, from this record, lacked that degree of competency guaranteed by the Sixth Amendment would make the Sixth Amendment virtually impossibile to abide by. No rational mind can conceive of such a proscriptive constitutional requirement as a condition precedent to the validity of a criminal conviction.

The jury in this case believed that Johnson stabbed a highway patrolman in the back and instructed another to shoot him with the patrolman's own gun. Their verdict was supported by overwhelming evidence. This officer was carrying out his duty in a peaceful manner, and posed no physical threat to Johnson or any of his companions. Civilized society depends upon peace officers for its survival. Such a murder can be equated with treason.

In his motion for post-conviction relief, Johnson asserts assignments XII, XVIII and XXIII which he failed to raise at trial or on the direct appeal. Having failed to raise them at trial or upon appeal, Johnson waived his right to assert them in his motion for post-conviction relief. Miss. Code Ann. § 99-39-21 (Supp. 1985); Irving v. State, 498 So.2d 305, 311 Miss. 1986); Mann v. State, 490 So.2d 910, 911

(Miss. 1986); Evans v. State, 485 So.2d 276, 280 (Miss. 1986); Dufour v. State, 483 So.2d 307, 308 (Miss. 1985).

Johnson also asserts assignments III, IV, V, VI, VIII, IX, XI, XIII, XVI, XVII, XIX, XXI, XXII, XXIV and XXV, which were considered and addressed by us on the direct appeal of his case. Consequently, these assignments are res judicata and cannot be raised again. Miss. Code Ann. § 99-39-21 (Supp. 1985); Irving v. State, supra; Evans v. State, supra.

DENIED AND WEDNESDAY, JULY 22, 1987, IS SET AS THE DATE FOR EXECUTION OF THE SENTENCE AND INFLICTION OF THE DEATH PENALTY IN THE MANNER PRESCRIBED BY LAW.

WALKER, C.J., ROY NOBLE LEE, P.J., [illegible] DAN LEE, ANDERSON AND GRIFFIN, JJ., CONCUR. ROBERTSON, PRATHER, AND SULLIVAN, JJ., DISSENT.

DECIDED MAY 27 1987

IN THE SUPREME COURT OF MISSISSIPPI

NO. DP-43

SAMUEL BICE JOHNSON

V.

STATE OF MISSISSIPPI

ROBERTSON, JUSTICE, DISSENTING:

I.

In a question begging opinion considering a point of first impression in the administration of this state's capital sentencing system, the majority today denies Samuel Bice Johnson post-conviction relief. It does so contrary to reason and fairness. With respect for my colleagues, I dissent.

II.

The point arises from the order of the Court of Appeals of New York dated March 24, 1987, in which that court vacated and held for naught Johnson's April 9, 1963, conviction of assault, second degree with intent to commit rape, first degree rendered by the Monroe County Court of New York. We may take it that Johnson's 1963 conviction as of the moment is absolutely void and of no further force and effect. Our review of Johnson's capital murder trial in this state reflects that the 1963 conviction was proved by the prosecution and successfully -- and argued vigorously -- as an aggravating circumstance, compelling the conclusion that Johnson should be given the death sentence. Miss. Code Ann. §99-19-101(5)(b) (Supp.1986). The jury in fact found this as one of the aggravating circumstances, to-wit:

> That the defendant, Samuel Johnson, was previously convicted of a felony involving the use or threat of violence to the person of another.

Today, that prior conviction having been declared a legal nullity, the majority begins by holding Johnson's claim "procedurally barred," adding yet another dubious chapter to this Court's recent and illicit romance[1] with procedural bars. The majority's point, as I understand it, is that, by waiting until after his 1963 conviction had been vacated before asserting any claim for relief, Johnson waived any rights he may have had in the premises .

To my mind, the opposite conclusion follows. Johnson had no basis for the claim he asserts until he obtained the order of March 27, 1987, vacating his 1963 New York conviction. Had he raised the point prior to March 24, 1987, we would no doubt have dismissed it out of hand and, consistent with the temper of the time, would probably now hold the claim barred by res judicata.

In our only consideration heretofore of the procedure by which today's point ought be raised, Phillips v. State, 421 So.2d 476, 482-83 (Miss.1982), we held that

> [T]he proper challenge to such a defective conviction lies in a separate action brought expressly for that purpose.

421 So.2d at 482.

Phillips arose in the context of an attack upon a prior conviction which had been used for enhancement of sentence under our habitual offender statute. Miss. Code Ann. §99-19-81 (Supp.1982). The Court held that a defective conviction was voidable, not void, and declared further that until such time as the conviction was judicially vacated in a separate proceeding, it could be used for habitual offender purposes. The Court then repeated that, rather than raising the point at the sentencing phase of the habitual offender action, the defendant's remedy was a separate post-conviction

[1] My view of the seamier side of this romance appears in Evans v. State, 441 So.2d 520, 531-33 (Miss.1983) (Robertson, J., dissenting) and need not be repeated here. See also Wheat v. Thigpen, 793 F.2d 621, 626-27 n.5 (5th Cir.1986).

action which, if successful, would no doubt then be the occasion for relief from his sentence as a habitual offender. Phillips, 421 So.2d at 483. The same rationale applies here.

III.

The majority next states that Johnson's death sentence should not be disturbed because, even should the prior conviction aggravating circumstance be eliminated, the jury found two other aggravating circumstances which remain undisturbed.[2] The majority then misreads Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). Stephens considers only the federal constitutional question. It holds a death sentence not constitutionally infirm by reason of the invalidity of one of several statutory aggravating circumstances found by a jury. The majority's citation to Stephens begs today's question, for we are confronted with whether as a matter of state law the vitiation of one of the aggravating circumstances found by the jury affords Johnson relief from his death sentence and, if so, what form that relief should take. Stephens merely sets minimal constitutional limitations and addresses in no way the question we ought to confront today.

IV.

One more point need be made before proceeding to the merits of today's state law question. The majority takes a swipe at the New York action suggesting that the Court of Appeals' March 24, 1987, order should be given less than full faith and credit. We are told that the March 24, 1987, proceedings were "less than adversarial." The point is disingenuous. For starters, I wonder if we would apply this approach in the converse situation. Where prior convictions have resulted from guilty pleas, would we say that those

[2] One of these is the highly problematic "the capital murder was especially heinous, atrocious and cruel." See Wiley v. State, 484 So.2d 339, 358-60(Miss.1986) (Robertson, J., concurring) and Jones v. State, ___ So.2d ___, ___ (Miss.No.Dp-60, dec. Jan.28,1987) (Robertson, J., concurring) (not yet reported).

proceedings were l s than adversarial and therefore give no credit to those conviction as aggravating circumstances. I think not. Further, I am confident the New York Court has displayed no greater penchant for vacating 25-year-old convictions than has this Court. Both pre- and post-Cardozo, the Court of Appeals of New York has enjoyed a reputation as one of the nations premiere state courts. I am not for a moment prepared in indulge in the cynical assumption that the New York Court did less than its duty when it ordered Johnson's 1963 conviction vacated.

V.

These things said, we confront a novel question. Where a previous conviction is proved as an aggravating circumstance, Miss. Code Ann. §99-19-101(5)(b) (Supp.1986), what is the impact upon a subsequent death sentence where thereafter the "aggravating" prior conviction is vacated?[3]

The point has been addressed, albeit obliquely, in two arguably analogous contexts. First, as indicated above, there is the case of Mississippi's habitual offender statutes. Miss. Code Ann. §§99-19-81 and -83 (Supp.1986). The Phillips case discussed above considered an attack upon one of the two prior convictions which had been relied upon by the prosecution in seeking enhanced punishment. Phillips makes clear that the fact that the prior conviction is under attack affords the defendant no relief. The logic of the opinion, however, is quite unmistakable: should the prior conviction ultimately be set aside, the defendant would then be entitled to relief from his enhanced sentence.

---

[3]THe point was before us in West v. State, 463 So.2d 1048 (Miss.1985). At the sentencing phase of West's trial, the prosecution had proved as aggravating circumstances two prior murder convictions in Georgia appeals from which were then pending. After West had been sentenced to die in Mississippi, the Georgia convictions were reversed. West v. State, 252 Ga. 156, 313 S.E.2d 67 (1984). We subsequently reversed West's conviction and sentence by reason of error in the guilt phase of his trial and, thus, never reached today's point which would have affected only the sentencing phase.

No resort t a harmless error analysis would be made in such case, for pr of of the prior convictions under Section 99-19-81 or 99-19-83, as the case may be, automatically results in enhanced punishment. Assuming vacation of a prior conviction leaves the defendant with only one prior conviction within the meaning of the habitual offender statutes, it would follow as a matter of law that the defendant would be entitled to have his sentence reduced to that provided for the underlying offense without enhancement. Phillips, therefore, suggests that Johnson may be entitled to relief from his death sentence.

On the other hand, as a matter of the law of evidence, we have for years held that a defendant could be impeached by a prior felony conviction even though his previous conviction was at the time pending on appeal. And, to be sure, Nicholson v. State, 254 So.2d 881, 883-84 (Miss.1971) finds no error in allowing such impeachment, even though the prior conviction is later reversed.[4] 254 So.2d at 884. One may search the Nicholson opinion in vain for any reason why this result should obtain. The mere fact that a defendant's conviction of a previous offense is treated as final, though on appeal, begs the question of the effect to be given that prior conviction should it be reversed. Nicholson makes quite clear that

> after the conviction has been reversed it
> cannot be used for impeachment purposes
> until the defendant is again convicted.

254 So.2d 884.

It would seem to follow upon ordinary reasoning that the reversal of the impeaching prior conviction should have the same effect on a pre-reversal trial.

My thought regarding the impeachment via conviction on appeal issue is that the prosecution, or any other party so

---

[4]The majority's citations to Young v. State, 425 So.2d 1022 (Miss.1983) and Milstid v. State, 347 So.2d 1319 (Miss. 1977) are without force or effect, for in neither of those cases had there been a reversal or vacation of the prior conviction used for impeachment.

using such a prior conviction, proceeds at its own risk. If the prior conviction on appeal should remain undisturbed -- and that is certainly what happens in the overwhelming majority of cases, there is no infirmity in any new conviction. Where, however, the Nicholson situation arises, that is, where the impeachment conviction is later reversed, the structure of the argument would seem to become one of whether the harmless error rule applies. I have come to prefer a recent articulation of that rule, i.e., does the error at trial undermine confidence in the outcome? See Malone v. State, 486 So.2d 367, 368 (Miss.1986).

In one sense the case at bar falls between the habitual offender situation considered in Phillips and the impeachment context of Nicholson. The prior conviction is certain to have an adverse impact upon one tried under the habitual offender statute. The impact of a prior conviction in an impeachment context is far more problematic. In the case at bar, we simply have no way of ascertaining with confidence whether the prior conviction was a significant factor in the jury's determination that Johnson should suffer the penalty of death. The jury was instructed at the penalty phase trial that the prior conviction was one aggravating circumstance it could consider. The prosecuting attorneys certainly argued that this aggravating circumstance was one that merited the death penalty. The "age" on the 1963 conviction could cut either way. On the one hand, the jury might have considered it remote and therefore given it little credit. On the other hand, the fact that Johnson had been involved in a violent crime in 1963 may have led others rationally to perceive that his penchant for violence had spanned two decades, his behavior beyond correction or reformation. We simply don't know.

Because of these uncertainties -- and in the context of the fact that Samuel Bice Johnson's life is at stake -- the majority quite correctly eschews rejection of Johnson's claim

on a harmless error basis. Such is consistent with the numerous cases wherein we recognize that sentences of death are qualitatively different in severity from any other that the defendant is to be given the benefit of the doubt when questions of prejudicial impact arise. See, e.g., Fisher v. State, 481 So.2d 203, 211 (Miss.1985); Jones v. State, 461 So.2d 686, 690 (Miss.1984); Billiot v. State, 454 So.2d 445, 455 (Miss. 1984); Neal v. State, 451 So.2d 743, 750 (Miss.1984); Williams v. State, 445 So.2d 798, 810-11 (Miss.1984); Laney v. State, 421 So.2d 1216, 1217 (Miss.1982); Irving v. State, 361 So.2d 1360, 1363 (Miss.1978). The majority manages, nevertheless, to deny Johnson's petition.

VI.

These things said, in my view Johnson is entitled to relief. He has presented this Court with a certified copy of the order of the Court of Appeals of New York of March 24, 1987, sufficient that we should hold that as a matter of law that he has proved the factual basis of his post-conviction claim. Past that, the effect of the vitiation of his 1963 conviction as a matter of law for the reasons set forth above, I would hold that vitiation of Johnson's 1963 New York conviction undermines confidence in the outcome of the penalty phase of his capital murder trial. I do not see how in candor the contrary may be contended. Accordingly, I would vacate the sentence of death imposed upon Johnson and restore the case to the active docket of the Circuit Court for a new trial on the question of sentence only.

PRATHER AND SULLIVAN, JJ., JOIN IN THIS OPINION.

SUPREME COURT OF MISSISSIPPI

MINUTE BOOK CA

509

MINUTES MARCH TERM 198 7

WEDNESDAY, JULY 15, 1987 :

SAMUEL BICE JOHNSON

DP-843 v.

STATE OF MISSISSIPPI

This cause came on to be heard on Petition for Rehearing of denial of Appellant's Petition for Leave to File Motion for Post-Conviction Relief on May 27, 1987, and this Court having considered the same is of the opinion that the same should be denied and same is hereby denied as ordered the 14th day of July, 1987, and entered this the 15th day of July, 1987.

ATTEST
A True Copy
This the 15th day of July, 1987
SUE GORDON, CLERK
SUPREME COURT OF MISSISSIPPI
By

Therefore, this Court is compelled to address this plain error in the sentencing order. Mississippi Supreme Court Rule 6(b); *Payne v. State*, 462 So.2d 902 (Miss. 1984); *Glover v. State*, 419 So.2d 588 (Miss. 1982); *Burnett v. State*, 285 So.2d 783 (Miss.1973). It is clear that the state sought conviction and sentence of the defendant as a recidivist. Only the quantity of time is in doubt, and the indictment clearly notices the defendant that the state was seeking only a seven year term. The defendant was wrongfully sentenced under section 99-19-83 to life imprisonment. This plain error is of constitutional dimensions.

This Court therefore reverses the sentencing portion of this case and remands to the trial court for resentencing to no more than seven years imprisonment without eligibility for parole or probation.

II.

The second assigned error here is ineffective assistance of counsel at both the trial and appellate stages. The allegations address the failure of defense counsel to object to alleged improper evidence in the sentencing phase and to challenge the imposition of a life sentence on appeal. All alleged allegations of ineffectiveness address the sentence enhancement portion of the defendant's trial.

[7] Since under the first assignment of error, this Court noted plain error and is remanding for proper sentencing under the statute applicable of section 99-19-81 (Supp.1984), the ineffectiveness issue on this ground has now become moot. *Read*, supra.

REMANDED FOR RESENTENCING NOT INCONSISTENT WITH THIS OPINION.

PATTERSON, C.J., WALKER and ROY NOBLE LEE, P. JJ., and HAWKINS, DAN M. LEE, ROBERTSON and SULLIVAN, JJ., concur.

Samuel JOHNSON, a/k/a Samuel Bice Johnson

v.

STATE of Mississippi.

No. 55265.

Supreme Court of Mississippi.

May 8, 1985.

Rehearing Denied Nov. 6, 1985.

Defendant was convicted in the Circuit Court, Pike County, L.D. Pittman, J., of capital murder of highway patrolman, was sentenced to death, and he appealed. The Supreme Court, Hawkins, J., held that: (1) overwhelming weight of evidence supported defendant's conviction; (2) defense counsel's motion for continuance filed on date trial was to begin contained none of the essential ingredients required under statute to justify continuance of the cause; and (3) life sentences of codefendants were not "relevant mitigating circumstances" in sentencing defendant. The Supreme Court, Roy Noble Lee, P.J., in part B held that trial court's refusal to instruct jury on their option to recommend life sentence even if aggravating circumstances were found to outweigh mitigation was not reversible error.

Affirmed as to guilt phase, affirmed as to sentencing phase.

Hawkins, J., filed opinion dissenting to Part B.

See also, 449 So.2d 225.

1. **Homicide** ⇐250

Overwhelming weight of evidence supported defendant's conviction for capital murder of highway patrolman.

2. **Criminal Law** ⇐711

State and defense counsel should be given wide latitude in their arguments to jury.

3. Criminal Law ⇐711

Court should be very careful in limiting free play of ideas, imagery, and personalities of counsel in their argument to jury.

4. Criminal Law ⇐728(2, 5)

It is duty of trial counsel, if he deems opposing counsel overstepping wide range of authorized argument, to promptly make objections and insist upon a ruling by trial court.

5. Criminal Law ⇐867

If argument is improper, and objection thereto sustained, it is duty of trial counsel to move for mistrial.

6. Criminal Law ⇐730(1)

Trial court is in best position to weigh consequences of objectionable argument, and unless serious and irreparable damage has been done, admonish jury then and there to disregard improper comment.

7. Criminal Law ⇐1171.1(3)

Defendant's conviction for capital murder could not be reversed on basis of prosecutorial misconduct in closing argument, where every one of defendant's complaints thereto could have been quickly dissipated by a contemporaneous objection and ruling by trial judge, but instead, defendant's trial counsel waited until conclusion of argument to object.

8. Criminal Law ⇐603(2)

Defense counsel's motion for continuance filed on date capital murder trial was to begin contained none of the essential ingredients required under statute to justify continuance of the cause. Code 1972, § 99-15-29.

9. Criminal Law ⇐632(4)

Trial court properly sustained motion in limine to prevent witness from testifying to fact that murdered highway patrolman had previously killed a black man, as that fact had no relevancy to defendant's capital murder prosecution.

10. Homicide ⇐308(1)

Trial court's instruction was proper regarding requirements of murder and capital murder, as acts necessary to come within capital murder framework were clearly defined, jury could not have been misled by instruction, and defense counsel approved the instruction. Code 1972, § 97-3-19(1)(a), (2)(a).

11. Criminal Law ⇐986.2(6)

While it is sole responsibility of trial court to sentence each accused who has been convicted or pleaded guilty, it is not improper for trial court to take into consideration in its sentencing that such person is cooperating with, and will be a witness for state in prosecution of other defendants.

12. Criminal Law ⇐691

If defense counsel under some unusual case wishes to withhold from jury fact that coindictee testifying for state has pleaded guilty and received a lesser sentence, he has duty to object to the testimony offered by state.

13. Criminal Law ⇐1036.2

Defendant could not complain on appeal of State's questioning of his witness bringing out that witness had pled guilty and had been sentenced to 25 years for his part in murder of highway patrolman, as defendant said nothing at trial, and complained for first time in posttrial proceedings regarding admission of such evidence.

14. Homicide ⇐305

Defendant on trial for capital murder of highway patrolman was not entitled to have jury separately instructed to consider whether he was guilty of being an accessory after the fact.

15. Witnesses ⇐6

State of Mississippi is without authority to compel attendance of out-of-state defense witnesses in a criminal case.

16. Witnesses ⇐2(1)

Under Mississippi Constitution, an accused is entitled to compulsory process for witnesses in his favor; but state's only power is to reach witnesses within the state. Const. § 26.

17. Costs ⇐302.2(1)

In prosecution for capital murder of highway patrolman, trial court did not err in denying defendant funds for out-of-state witnesses, as trial court was only presented with a summary by defense counsel, not sworn to, as to what these witnesses might testify.

18. Criminal Law ⇐1171.1(6)

No reversible error was committed in statement made by prosecution during argument, notwithstanding murder defendant's contention that State led jury to believe that if he were sentenced to life, he would eventually be paroled.

19. Criminal Law ⇐1134(3)

It is duty of Mississippi Supreme Court under statute as well as United States Constitution to review proportionality of every death sentence. Code 1972, § 99-19-101(5)(b); U.S.C.A. Const.Amend. 8.

20. Homicide ⇐354

Jury was warranted in believing defendant an active participant, if indeed not the leader, in deliberate, brutal slaying of highway patrolman carrying out his duties, and thus jury could properly return death penalty.

21. Homicide ⇐7

"Murder" embraces within its meaning cruelty, brutality, and an evil intent carried to the ultimate in harm: death.

See publication Words and Phrases for other judicial constructions and definitions.

22. Homicide ⇐354

Murder of a police officer in line of duty must be equated with treason or espionage in time of war; such crime warrants most severe punishment society exacts.

23. Homicide ⇐354

In prosecution for capital murder of highway patrolman, defendant was entitled to have trial jury consider any relevant mitigating circumstances.

24. Homicide ⇐354

Life sentences of codefendants were not "relevant mitigating circumstances" in sentencing defendant for capital murder of police officer.

See publication Words and Phrases for other judicial constructions and definitions.

25. Homicide ⇐354

Statute authorizing sentencing jury to consider as an aggravating circumstance that capital murder defendant was previously convicted of felony involving the use or threat of violence to the person fulfilled guidelines of United States Supreme Court's *Zant* decision. Code 1972, § 99-19-101(5)(b).

26. Courts ⇐509

It is not the purpose of federal appellate review to deny to states the authority to and responsibility for determining aggravating circumstances which justify death penalty.

27. Constitutional Law ⇐70.1(10)

It is not function of Mississippi Supreme Court to curtail authority of legislature for determining aggravating circumstances which justify death penalty.

28. Homicide ⇐354

Legislature had power and lawful authority to include fact that defendant was previously convicted of felony involving use or threat of violence to person as aggravating circumstance in prosecution for capital murder regardless of remoteness of prior conviction. Code 1972, § 99-19-101(5)(b).

29. Criminal Law ⇐1171.8(1)

Admission, in rebuttal, at guilt phase of trial, of conversation between defendant and cellmate/coindictee regarding defendant's use of knife to kill highway patrolman was not reversible error on ground that prosecutor deliberately violated trial court suppression order, as conversation was not embraced in any discovery motion or discovery order.

30. Criminal Law ⇐685(1)

Permitting officer of court to remain in courtroom during trial at which he may be testifying is discretionary with trial court.

31. Crimi. Law ⇐637

Capital murder defendant was not brought into courtroom in presence of jury in handcuffs so as to prejudice his defense.

32. Criminal Law ⇐432

In prosecution for capital murder of highway patrolman, trial court properly permitted introduction into evidence of checks found in certain automobile, after ruling that they could only be referred to as "documents," as these documents were not circulated to jury, and as they were referred to by fingerprint expert as having defendant's fingerprints.

33. Criminal Law ⇐1115(1)

In prosecution for capital murder of highway patrolman, record did not support defendant's contention that State failed to provide him with counsel in initial appearance hearing.

34. Jury ⇐108

In prosecution for capital murder of highway patrolman, trial court did not err in excluding jurors who clearly had fixed conscientious scruples against infliction of death penalty.

35. Criminal Law ⇐1213.8(8)

Administration of death penalty was not arbitrary and discriminatory in violation of murder defendant's Eighth and Fourth Amendment rights under United States Constitution. U.S.C.A. Const. Amends. 4, 8.

36. Homicide ⇐341

Trial court's refusal to instruct jury on their option to recommend life sentence even if aggravating circumstances were found to outweigh mitigation in prosecution of defendant for capital murder of highway patrolman was not reversible error.

Kenneth J. Rose, Jackson, for appellant.

Edwin Lloyd Pittman, Atty. Gen. by William S. Boyd, III and Marvin L. White, Jr., Sp. Asst. Attys. Gen., Jackson, Bob Evans, Dist. Atty., Magee, for appellee.

En banc.

HAWKINS, Justice, for the Court:

On December 31, 1981, around two o'clock in the afternoon Mississippi Highway Safety Patrolman Billy M. Langham, while acting in line of duty, was murdered on U.S. Highway 49 in Covington County, at the city limits of Collins. He was stabbed with a butcher knife in the back between his shoulder blades, and shot at close range with his own revolver.

Samuel Bice Johnson, one of three men indicted for his murder, following a change of venue, was tried in the Circuit Court of Pike County for capital murder, sentenced to death, and has appealed. Two other men charged in the murder, Otis Lee Fairley and Charles Montgomery, Jr., following separate trials, have been convicted of capital murder, and each sentenced to life imprisonment.

We affirm.

There is no dispute but that Langham was murdered, but it was Johnson's contention at trial and on this appeal that the murderer was Anthony Fields, who constituted the fourth culprit there at the scene of trouble with Patrolman Langham. Johnson has raised numerous issues on his appeal, which we will address. First, the facts.

FACTS

Anthony Fields and Otis Lee Fairley are first cousins. On December 31, 1981, they were staying together in New Orleans. Around 10:00 that morning the two of them were picked up by Samuel Bice Johnson and Charles Montgomery, Jr., in a 1971 Ford LTD with a yellow body and brown top, Johnson driving.

Fields had seen, but never met Johnson or Montgomery prior to that morning. Montgomery rode on the front seat with Johnson with Fields on the left and Fairley on the right side of the back seat. Their destination was Collins. Fairley was born in Collins and lived there until 1968. Fields was born in Gulfport, where he lived for 15

years and then moved to New Orleans. The precise purpose of their trip to Collins is not shown in the record. Fields's mother lived in Collins, having moved there three years previously; Fairley had two sisters living there; and they both had numerous kinsmen there. Fields never lived in Collins.

En route they stopped in either Lumberton or Purvis where Fairley had a sister.

They were traveling North on Highway 49, presently four lanes with a strip between the North and South bound lanes. There are several low hills as the highway approaches Collins from the South.

At approximately 1:30 that afternoon, as they were approaching Collins, they passed Highway Patrolman Billy M. Langham, parked in a Dodge patrol car, with a blue light on top and Highway Safety Patrol decals on its sides. Langham was in uniform, wearing his badge, and armed with a .357 caliber magnum Smith and Wesson revolver.

As they passed the patrol car, Langham started after the Ford with his blue lights blinking. Johnson pulled his car over on the right shoulder and Langham parked the patrol car just a few feet to the rear. Langham walked to the driver's side of Johnson's car and asked to see Johnson's license. Johnson replied he had no license and Langham told him to get out of the car.

The state's version of what then transpired came primarily from Fields, who testified that after Johnson got out of the car Langham noticed a butcher knife on the front seat. Langham picked the knife up, put it on top of the patrol car next to the blue light, and told Johnson to go to the back of his car.

Langham then came back to the Ford car and told the other three he was going to have to search them. They also got out of the car, Langham patted all of them lightly and told them to stand by his car. Fields noticed Johnson whispering to Fairley.

Langham then went to the Ford and searched the front seat. The officer then started the search of the back seat. As he was in the process of searching the back seat, Fairley got the knife off the top of the patrol car and gave it to Johnson. Then, as the officer straightened up from searching the back seat, Johnson stabbed him in the back.

When Fields was asked on direct examination why Johnson would stab the officer, he replied it was to escape.

Fields further testified that when Johnson stabbed Langham, the officer reached for his revolver. He said Johnson then changed hands and went for the revolver, also, and the two started tussling, and Johnson kept on stabbing the officer. Johnson yelled to Fairley to "come knock him out," and after several calls Fairley suddenly ran over and started hitting Langham in the face. Johnson then yelled for Montgomery to get the officer's gun. Montgomery, who was then standing close by the scuffle, hesitated, and then suddenly reached and grabbed the gun. Montgomery then said, "I got it."

The scuffle began by the Ford and moved back towards the patrol car. The officer looked to Fields and said, "Help." Fields did nothing.

When Montgomery got the pistol, Johnson and Fairley both ran for the car. Montgomery remained standing there with the gun on the officer. Langham asked Montgomery, "Please don't shoot me." He asked this more than once.

Montgomery was holding the gun with both hands. He took one hand off to open the car door, and Johnson, who was under the steering wheel, told Montgomery, "No, shoot the m....f....." Montgomery hesitated, and Johnson repeated the statement.

Montgomery then put both hands on the pistol and started walking towards the officer. Fields, by this time in the back seat of the LTD, dropped his head so as not to see, and heard a shot. He then heard Montgomery say, "I got him," and Montgomery got into the car. As Johnson drove off Montgomery threw the gun out the window. The record does not reveal from

Fields ...dimony when he got back into the car.

Johnson cursed Montgomery for throwing the gun away, slowed the car down, but because there were witnesses approaching from behind, he did not stop.

As they were driving Johnson repeatedly said he had to find another car. He parked the Ford, and they all got out and ran for a railroad track. When they got on the track, they started walking towards town. Johnson removed the sweater he was wearing and threw it beside the track, which Fields described as brown. Johnson had no clothing under the sweater. Fairley removed his sweat suit to give Johnson his t-shirt, which Johnson put on.

They spotted a yellow Mercury Comet beside the track next to a building. Johnson inspected the car, found the keys were in it, and the four of them got into the car, Johnson driving.

Fairley got on the front seat with Johnson, and Montgomery and Fields got in the back. Johnson told Montgomery and Fields to lie down, which they did.

As they were traveling in the Comet, Johnson asked the others if they thought he did the wrong thing. Montgomery and Fairley said he did the right thing, and Johnson said he'd rather be dead than go back to jail.

The Comet ran a road block at the intersections of Highways 35 and 84 in Jeff Davis County. The officers on the scene shot the tires, and the Comet stopped. Fairley and Johnson ran from the car.

Fields got out with his hands up, and was arrested. Montgomery remained in the car and was arrested.

The officers pursued Johnson and Fairley on foot, and in a short distance caught and arrested them both.

Fields pleaded guilty to the crime of accessory after the fact and was sentenced to five years. He also received three 10-year sentences for guilty pleas to other crimes, two to run concurrent, one consecutively: a total of 25 years to serve. He testified as a witness for the State. He had no prior felony convictions. He had previously been charged with possession of ...eadly weapon, assault, and possession ...stolen property, and convicted of a misdemeanor, for which he served some time in jail.

On cross-examination Fields admitted to drinking on the way to Collins. The others smoked some marijuana. He said he stood by the front left tire of the patrol car while the scuffling was going on, and never touched Langham. He also testified that when he was questioned by an officer if Johnson did not pull the knife from his pocket he had answered "yes." He admitted he had forgotten to tell the officers about Johnson removing the sweater until some time later, and when he did recall the incident he told his lawyer.

He said the first time he saw the butcher knife was when the officer put it on top of the patrol car. Until then he was unaware Johnson had a knife. He also admitted telling the officers Johnson had a coat on, but said Johnson had the coat on after Montgomery gave it to him.

For purposes of clarity in this opinion, we have given the testimony of Fields first, although he was the last person who testified in the case in chief for the State. We relate the remainder of the facts as told by the State's witnesses.

Andy Wade, a 12- or 13-year-old boy, was riding North on the highway and noticed passing a patrol car parked behind a yellow car, and a patrolman apparently searching the back seat area of the yellow car.

Andy Cochran and his niece, Mrs. Brenda Townsend Watson, wife of a highway patrolman, were two of the occupants of a car traveling South on the highway. They noticed the blue lights on the patrol car, slowed down, and observed the yellow Ford parked in front of the patrol car. They also observed three black men tussling with the patrolman. They saw the officer break away, and being grabbed by the three men. They observed the officer's arm being held behind his back, and blood between his shoulders running down his shirt. Three men were involved in the

tussling. Mrs. Watson saw the officer being pushed down the embankment. They proceeded South to a place where they could cross over into the North-bound lane of the highway, observing the affray as best they could. By the time they had turned around and got back to the scene, the yellow Ford had driven off. Cochran identified the yellow car as a Ford LTD. Cochran briefly examined the slain officer, and took off after the yellow Ford. They saw a deputy sheriff and reported what had transpired. Neither Cochran nor Mrs. Watson was able to identify any of the individuals involved in the trouble. Mrs. Watson testified she did not see any person making an attempt to help the officer, or any person merely standing around, doing nothing.

Charles Dodds was driving North on the highway. As he approached the scene, he noticed at least three men pushing and shoving the patrolman between the cars and the right-hand ditch. At very first glance they appeared playful. He noticed one man with his arms around the patrolman. Dodds parked his car 60–75 yards from the scene. He noticed the patrolman either being pushed, or breaking away towards the ditch. He could not tell whether the scuffle was beside or in front of the patrol car. He noticed the patrolman taking about two steps towards the ditch as though trying to regain his balance. Either his back or side was to the men, and just as he finished his second step, another man, standing to the left of the man holding the officer, shot him.

Dodds reached and got his own gun and loaded it. By the time he raised up all but one of the men had got into the yellow car. He saw the last man getting in on the right hand side.

On cross-examination Dodds testified that at one time it appeared the men were almost in a straight row. He noticed one of the men was huskier than the others, and he observed this man holding the officer. Johnson was not husky. Dodds did not observe any of the blacks standing around doing nothing.

Charles Hollingsworth, a first lieutenant in the Army, a graduate in criminal justice from Mississippi Southern University, and a former police officer in Hattiesburg, was traveling North on the highway when he first observed at least two people at the right rear of the Ford fighting with the patrolman. It seemed to him one person was holding the patrolman and two more were hitting him.

He stopped his car some thirty to thirty-five feet from the Ford and continued to watch. He was about to get out of his car when he heard a shot. There was no fighting going on when he heard the shot. He saw no weapon. Just before the shot was fired, it appeared the patrolman had been pushed back five or ten feet from the others. When Hollingsworth heard the shot, he dropped to his car floorboard.

When he raised up he observed men getting into the Ford. He could only identify Anthony Fields. His testimony as to what he observed Fields doing is ambiguous. On cross-examination he testified as follows:

Q. Coming down 49 you saw what appeared to you to be a scuffle, is that right?

A. There was a fight going on, yes, sir, it was.

Q. And you have said previously that there were at least two people involved, is that right?

A. That is correct.

Q. You also said that there could have been more people involved, is that right?

A. That is correct.

Q. Did you see those people?

A. I saw at least two people.

Q. Did you see more than two people?

A. There could have been more than two people.

Q. Did you see any more people?

A. I at least saw two in the view that I had from my car.

Q. Didn't see anyone else other than those two, is that right?

A. They were the two I saw initially, that correct.

* * * * * *

Q. Did you tell Wade Parham in a telephone conversation that there could have been someone in the car?

A. I could have possibly said that. I don't remember saying it.

Q. But you're not denying it, is that correct?

A. I'd have to look at my testimony on my original statement.

Q. I hand you a copy of your transcript of the telephone conversation. I'd like to call your attention to—Mr. Parham asked you the question: "Did you see more than two blacks, Mr. Hollingsworth? And you said, 'There were probably more than two but, you know, I only noticed two. There could have been more out of the car and there could have been one guy that was still driving? Did you say that?

A. It's in the statement. I guess I did say it.

Q. Thank you, sir. When you first saw those people if there was a scuffle, the scuffle had already—if there was a stabbing that stabbing would have already taken place, is that right?

A. I cannot answer that.

Q. Did you see anyone stab the Highway Patrolman?

A. No, I did not.

Q. Did you notice whether the Highway Patrolman was hurt?

A. At what point in time?

Q. When you first saw him?

A. When I originally saw him I could not tell.

Q. Did you see anyone stab the Highway Patrolman?

A. No, I did not.

Q. Did you see anyone shoot the Highway Patrolman?

A. No, I did not.

Q. But you heard the shot, didn't you?

A. Yes, I did.

Q. Okay. Backing up just a short piece in time, when you stopped after you saw the scuffle you saw only two people, correct?

A. That's what I had in my statement, yes.

Q. Had there been more people out there they could have already gotten back in the car, is that correct?

A. That is a possibility.

Q. Okay. And you were able to identify one of those two people, weren't you?

A. Yes, I did.

Q. Tell the people of the Jury who that man was?

A. I do not recall what his name was.

Q. Was it Anthony Fields?

A. I believe it was.

Q. Are you not certain?

A. I know I identified him; I don't remember what his name was.

Q. Would you like me to help you with your statement? It was Anthony Fields, wasn't it, and you identified him?

A. Yes, it was.

Q. He's the man that turned State's evidence, is that correct?

A. I believe so.

Q. You said he was a big one, he was husky, correct?

A. I believe I said that, yes.

Q. And you saw two people and then you heard the shot, is that right?

A. That's correct.

Q. Was Mr. Fields trying to help that police officer?

A. I don't know.

Q. He was fighting with that police officer, wasn't he?

A. He was one of the men I identified. I could not tell.

Q. You told the District Attorney's office that they were fighting with that police officer, didn't you?

A. Yes, I did.

Q. You did? So he was fighting with him, wasn't he?

A. I don't know if Mr. Fields was fighting with him, but I know—

Q. [INTERRUPTING] What about the two men you saw, were they fighting or just—

BY MR. EVANS:

If the Court please, I request that he be allowed to finish his answer before he asks another question.

BY THE COURT:

Yes. Let him finish his answer and then you may ask another question.

BY MR. DIAZ:

I beg the Court's indulgence.

A. Would you repeat the question, please?

Q. In your previous statement you said that you saw two black men, is that right?

A. That's correct.

Q. And you told in your statement that those two men were fighting with the Highway Patrolman? Is that correct?

A. That's correct.

Q. And you identified one of those two men as Anthony Fields, didn't you?

A. I identified one of the men that I could recognize as Anthony Fields, that's correct.

Q. He was one of the men fighting with the Highway Patrolman, wasn't he?

A. He could have been, yes.

Q. Okay. The man sitting right over there in the green suit, is he the other man?

A. I don't know.

Q. Take a good look at him.

A. I said I don't know. This all happened in a matter of some ten or fifteen seconds.

Q. Okay. To be certain that there's no confusion, this is not the man you identified, is it?

A. No, it is not.

Q. The man you identified was heavyset and known to be Anthony Fields, correct?

A. That is correct.

[Vol. VIII, pp. 1319–1324]

Bennie Sasser was the final disinterested eyewitness for the State. He was a resident of Covington County, and traveling North on the highway. As he approached the parked vehicles, he noticed something unusual. He observed the patrolman jerk his arm up suddenly and that he was being hit in the back. He then testified [Vol. VIII, pp. 1326–27]:

> There were three, possibly four black men standing out there, and one black man was shorter and heavier-set that was doing the hitting in the back of the Patrolman. Then I observed the Patrolman got away from them, was pushed or something and he ran down the embankment, and about this time I was having to dodge a pickup that was in front of me, and I looked back and he was running back toward them. And as I swerved back around then I noticed that they were getting in their car, the car doors were open, and that's the last time I saw them . . . .

On cross-examination he testified that the husky man he observed hitting the officer in the back was not Johnson. He said it was possible that the man hitting the officer in the back could have been stabbing him.

The postmortem by Thomas Glen Puckett, Hattiesburg pathologist, revealed three wounds: a cut to the bone over the left eye and cheekbone; a 2–2½ inch long, 7–8 inch deep stab wound to the back below the shoulder blades extending into the lung cavity; and a stellate entrance gunshot wound about the level of the left eyebrow. This type of wound was indicative of a weapon being fired at such close range that the gases from the discharging weapon also entered the victim. Langham's right eye was bulged out markedly as a result of gas from the weapon. The bullet traveled through the brain and lodged between the right rear exterior of the brain and skull.

The doctor testified that Langham was killed by the gunshot wound. He further testified that the stab wound, while serious, might not have been fatal, particularly if Langham could have received reasonably prompt medical attention; but on the other

hand could have resulted in death within ten minutes.

Ballistics tests revealed the bullet removed from Langham's skull was fired by his own .357 caliber magnum revolver. This revolver and the butcher knife were found at the scene of the slaying. No fingerprints were recovered from either weapon. also, tests for powder residue from a discharged firearm were negative as to all four: Johnson, Montgomery, Fairley and Fields.

Following their arrest Johnson was observed as having a bad cut on his right palm, for which he received medical treatment.

Tests showed the bloodstains on the knife were Langham's. Also, bloodstains on various parts of the exterior of the yellow Ford were determined to be Langham's. Other stains were found to be blood, but the expert was unable to identify the precise type.

The sweater, which Fields called brown, and identified by all witnesses at trial as being white, was found by Lawrence Anderson, assistant chief of police of Collins, just off the railroad tracks in the area where Fields testified it had been thrown. Tests showed the bloodstains on the body of the sweater came from Langham, and bloodstains on the sleeve came from Johnson.

On clothing identified as belonging to Montgomery tests showed bloodstains of Langham.

No bloodstains were found on Fields's clothing.

Bloodstains were found on Fairley's clothing but not identified.

All the bloodstains on Johnson's clothing were of his own type.

Joe E. Andrews, Jr., an expert on hair and fiber identification employed by the Mississippi Crime Lab, testified there are three basic fibers: animal, plant and synthetic. From his examination of Johnson's clothing, he found gold synthetic fibers with the same characteristics as found on the sweater. Also, from an examination of Montgomery's clothing, he found gold synthetic fibers with the same characteristics as on the sweater. It is not clear from the record whether these fibers found on the sweater and Johnson's and Montgomery's clothing were part of the fabric of the sweater, or simply fibers that had become attached to the sweater. On cross-examination Andrews conceded it was possible that all three of these gold synthetic fibers could have come from some common source other than the sweater.

No such fibers were found on either Fairley's or Field's clothing, nor on Langham's clothing.

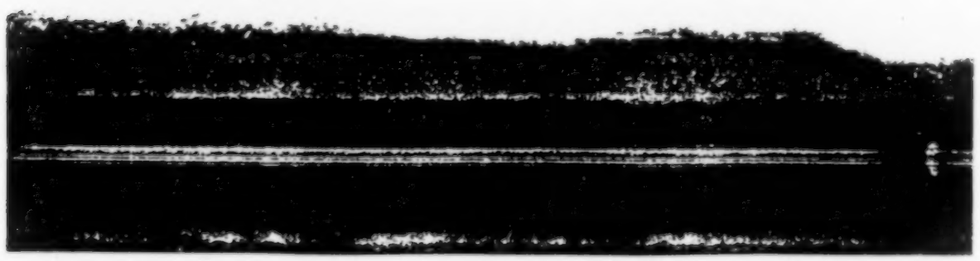
Johnson did not testify. The only eyewitness testifying in Johnson's behalf was Fairley, who gave an entirely different version of the affray.

Fairley testified that after Johnson stopped the car, Langham came over to the driver's side of the car and asked Johnson if he had a driver's license, and when Johnson replied "no," the officer told him to step to the back. He said the officer then came around to the passenger's side and asked Montgomery to get out, and step to the back of the car, following which the officer began searching the front passenger seat. After searching the front of the car, the officer told Fairley and Fields to get out of the car. He testified the officer did not find a butcher knife on the front seat of the car, and did not put a knife on top of the patrol car.

He said the officer told them to "stand to the back." (Vol. XI, p. 1889) Further, he stood at the front end of the patrol car, and the other three were there standing along the side, by the front of the patrol car.

Fairley said the officer had begun to search the back seat of the car and Fields walked up and stabbed him, and that the first time he ever saw the knife or had any knowledge of it was when Fields stabbed the officer.

Fairley said Johnson then ran up and grabbed for Fields, he guessed, and got cut, and that he then ran to the car. He testified that Johnson screamed and cursed



that he had got cut. Fairley said Montgomery came to the car next, and seconds later after Johnson got cut, he came to the car, also. He said Johnson tried to crank the car up and it wouldn't get started at first, but finally started, and then they heard a shot and Fields came to the car. Fairley said Fields had a white sweater on.

He did not know whether Johnson got the knife away from Fields or not, but the struggle lasted only seconds.

On direct examination Fairley testified he had been convicted of murder two times (apparently the last time was a conviction for Langham's murder), and twice for assaults, one with, and the other without malice.

On state cross-examination Fairley was asked the purpose of the trip to Collins, and the trial judge sustained the objection to this question.

Further, on cross-examination he testified when the officer was stabbed "we ran up to help the officer and that's when the struggle started. I ran to the car." He said his intention was to grab Fields and when Johnson screamed he ran to the car. He did not relate Montgomery as participating in the affray in any way, but when he ran back to the car Montgomery was there, also.

He said Fields held the officer, stabbed him and scared off the other three all by himself. And, Fields got in the car by the time Johnson got it started.

Further, on cross-examination Fairley said Fields gave Johnson directions to drive the yellow Ford, and they ended up down by the co-op and railroad track. He then testified Fields ran into the yellow Comet, and at this time Johnson and Montgomery were down the street. Fields got in the Comet and Fairley got in and they drove off to Johnson and Montgomery, who then got in. Fields drove just a short distance and said he was too nervous to drive, and asked Johnson to drive. He testified Johnson, with his hand bleeding, got out of the back seat and got in the front seat and started driving.

As to the white sweater which Fairley testified Fields was wearing, he said while they were on the tracks he asked Johnson and Montgomery to help him pull the sweater off. He could not remember how they pulled it off.

He said the reason the three of them did not grab Fields and overpower him was they were afraid, or had panicked.

He admitted that he had told his sister Rosa McCullen that Johnson stabbed the officer and Montgomery had shot him.

Dr. William Munn testified to treating two lacerations at the base of the thumb and little finger of Johnson's right hand, which had almost stopped bleeding at the time he was treating Johnson. Neither wound involved muscles or tendons. The doctor recalled stitches were put in one or the other of the wounds.

There were four jail house witnesses, two who testified for the defense, and two in rebuttal for the state. James Jenkins and Carl Lee testified that while they were in the Simpson County Jail they heard Fields admit to Fairley he had lied to save himself from going to the gas chamber.

Norman Shelly in rebuttal testified he heard Fairley and Johnson talk about Fairley taking the knife and Johnson stabbing the patrolman. Danny Russell in rebuttal testified Johnson asked him to say that Fields had lied and tricked the state.

PART A.

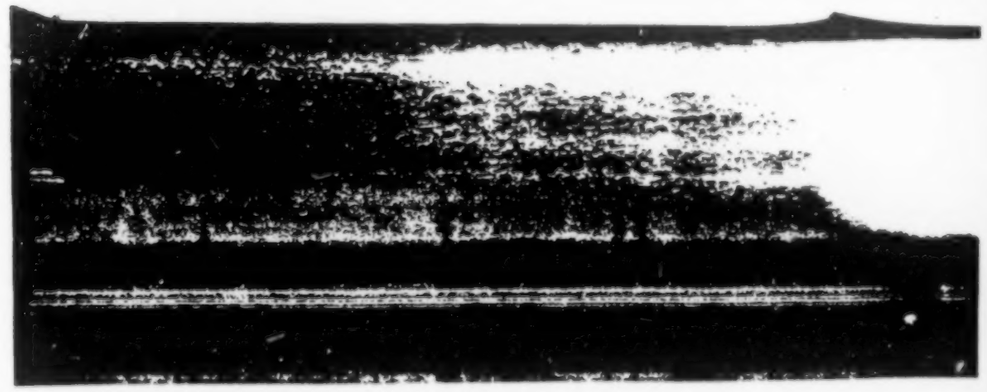
LAW

GUILT/INNOCENCE PHASE

I.

WEIGHT OF THE EVIDENCE

[1] Johnson's first contention is that the verdict of the jury is against the overwhelming weight of the evidence. Fields testified Johnson stabbed Langham and told Montgomery to shoot, drove the get away car, and led the group. Only Fairley disputed this, and he admitted that he had told his sister Johnson stabbed the officer



and Montgomery shot him. The credibility of these witnesses was for the jury. Disinterested eyewitnesses, who saw varying brief time frames of the affray, were not able to specifically identify Johnson as doing anything to the officer during their respective moments of observation, and two recalled Fields under circumstances which would indicate he may very well have been more than an idle spectator, as he testified. There again, it was for the jury to accept the portions of Fields's and Fairley's testimony they wished to believe or discredit. This Court has long held, as stated in *Cochran v. State*, 278 So.2d 451 (Miss.1973), citing *Wilson v. State*, 264 So.2d 828 (Miss.1972):

> In a criminal prosecution, the jury may accept testimony of some witnesses and reject that of others, it may accept in part and reject in part the testimony of any witness, or it may believe part of the evidence on behalf of the State and part of that for the accused. In other words, the credibility of witnesses is not for the reviewing court. *Bond v. State*, 249 Miss. 352, 162 So.2d 510 (1964).
>
> It was the function of the jury to pass upon the credibility of the witnesses and to resolve the issues. Since there was ample evidence, which if believed by the jury, justified the verdict, the verdict will not be disturbed on appeal. *Murphree v. State*, 228 So.2d 599 (Miss.1969). (264 So.2d at 830). [Other citations omitted]

See also: *Dickerson v. State*, 441 So.2d 536 (Miss.1983) at 538, citing *Gandy v. State*, 438 So.2d 279, 285 (Miss.1983); *Pearson v. State*, 428 So.2d 1361, 1364 (Miss.1983); and *Gathright v. State*, 380 So.2d 1276, 1278 (Miss.1980).

Significant is the testimony that both Johnson's and Langham's bloodstains were found on the sweater. Langham's bloodstains were found on Montgomery's clothing, and unidentified bloodstains were found on Fairley's clothing, but no bloodstains were found on Fields's clothing. Also, synthetic fibers from a common source were found on the sweater, Johnson's clothing and Montgomery's clothing. None was found on Fields's clothing.

The evidence for the jury was not limited to the co-indictee Fields. His testimony was corroborated by the bloodstain and fiber tests. Further, the only witness who directly disputed Fields was Fairley, and from this record his testimony is not convincing. Moreover, Fairley admitted telling his sister that Johnson stabbed, and Montgomery shot the officer. Johnson was indicted for capital murder in the death of a patrolman acting in his official capacity, with knowledge he was a police officer acting in his official capacity, in violation of Miss.Code Ann. § 97-3-19(2)(a).

There was a clear jury issue on Johnson's guilt, and we are not at liberty to disturb it.

II.

IMPROPER CLOSING ARGUMENT

Johnson contends there was prosecutorial misconduct in the closing argument. The district attorney made the opening and rebuttal arguments for the state. Johnson's two trial attorneys each made closing arguments in his behalf.

Prior to the circuit judge instructing the jury, defense counsel asked the court to permit them to delay making objections to closing argument until the state had concluded, and make such objections outside the jury's presence, so as not to interrupt the argument. Defense counsel also warned that they might object, in any event, "if something gets out of hand." The record reveals the following (Vol. XII, p. 1984):

> BY MR. HARPER:
>
> And, Your Honor, one other thing too, rather that—I don't know if we are going to want to make objections during the closing. What I'd like to do is, so that we not interrupt, is to ask to reserve our right to make objections until the closing is completed; and outside the presence of the Jury, make our objections at that time. Of course, if something gets out of hand, we will have to object at that point.
>
> BY MR. EVANS:
>
> That's very considerate of you. Thank you.
>
> BY THE COURT:
>
> Okay.

In the state's opening argument, the district attorney made the following statement (Vol. XII, p. 2058):

> ... Samuel Johnson wanted to be the judge and the jury that day. He wanted to return the verdict and then he wanted to return the sentence, but today is a different day. Today is the day I've waited for a long time because besides being an officer, Billy was a friend. Today is the day that Samuel Johnson is going to answer to twelve jurors for his crime. Today is the day and y'all are the twelve.

When defense counsel Harper had concluded his argument, he made the following objection to the opening argument of the district attorney (Vol. XII, p. 2068):

> BY MR. HARPER:
>
> Your Honor, at this time the Defendant would object to Mr. Evans' statements concerning his personal relationship with the Deceased, stating that he was a personal friend of his. There is nothing of that into evidence at all before this Jury, and we also move for a mistrial on that basis. It improperly prejudices the Jury.
>
> BY THE COURT:
>
> Let the record be noted and I will caution Mr. Evans in the future.
>
> BY MR. HARPER:
>
> And my motion for a mistrial, then, is overruled?
>
> BY THE COURT:
>
> Overruled. Let the Jury come in, please.

No objections to the district attorney's argument were made until he concluded. Among his remarks objected to were the following [his rebuttal concluded (Vol. XII, p. 2125)]:

> ... Like I said a minute ago, I pray to God that he gives you the wisdom to see through this and to see Samuel Johnson for the murderer he is because there ain't nothing else I can do but pray about it now. If he does give you that wisdom and if he gives you that strength of conviction and if he gives you that courage, you're going to find this man guilty of capital murder. Thank you.

The district attorney opened his rebuttal argument with the following comment (Vol. XII, p. 2112):

> I've been a lawyer since 1975, which ain't a long time to a lot of folks, I guess, but since then I've tried an average of one case a week, which makes a little better than three hundred cases. I'm going to tell y'all and everybody here and Mr. Diaz that I have never heard such blatant, arrogant disregard for the truth and patronizing tones that I've just heard from what you call a closing argument, and I'm not going to dignify the majority of it with an answer, ...

At the conclusion of the district attorney's argument, defense counsel made the following objections, followed by a motion for a mistrial, which was overruled (Vol. XII, p. 2127-2129):

> BY MR. DIAZ:
>
> Your Honor, we have three objections to Mr. Evans' closing argument, the first being that he made a personal comment, "Pray to God," based on personal belief. It violates, Your Honor, the Fourteenth Amendment and the Eighth Amendment.
>
> Your Honor, the second reason is personal attacks on myself. He called me a liar. It violates my Eighth Amendment, Fourteenth Amendment, and Mr. Johnson's Sixth Amendment.
>
> I also object to him making the comment that Mr. Johnson didn't want to go back to jail, and I would like to move for a mistrial.
>
> BY THE COURT:
>
> Let the motion for a mistrial be overruled and let the record show that this was at the conclusion of the case, and the attorneys agreed that they would not

make objections during the argument and it kind of binds the hands of the Court.

BY MR. ROBERTS:

I want to make a statement into the record too. I think that Mr. Evans' conduct was extremely commendable considering Mr. Diaz's comments from the Bible, which counteracts Mr. Evans', "Pray to God," and also Mr. Diaz' [sic] comments about cheap tricks imposed by the District Attorney. I want that in the record.

BY THE COURT:

Of course, the full record is—

BY MR. ROBERTS:

Yes, sir.

BY THE COURT:

—in the record.

BY MR. ROBERTS:

Yes, sir, I just want to make those comments too.

BY THE COURT:

Yes, sir.

BY MR. DIAZ:

Thank you, Your Honor.

Trial was held from August 30 through September 3, 1982.

On October 11, 1982, Johnson's trial counsel filed a nine-page motion for a new trial, assigning twenty-nine reasons why it should be sustained. The fifteenth assignment reads as follows (Vol. XIII, p. 2308):

15. The closing argument of the District Attorney in the guilt/innocence phase of Petitioner's trial, was inflammatory, included statements unsupported in the record, and contained a personal attack against Petitioner's trial counsel. The District Attorney accused defense counsel of fabricating evidence on Petitioner's behalf. The argument, in its entirety, was extremely prejudicial to Petitioner and violated his constitutional rights to due process and a fair trial as guaranteed by the laws and Constitution of the State of Mississippi and the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

On October 12, 1982, the circuit judge entered an order relieving the trial counsel Gerald Diaz, Jr., and Gregory Harper, and appointing Kenneth J. Rose to represent Johnson on appeal and in future proceedings. This attorney filed a supplemental motion for a new trial on August 29, 1983, assigned seven additional grounds for a new trial, making no mention of the district attorney's argument. Thereafter, on August 31, 1983, counsel filed a second amended motion for a new trial assigning two additional grounds, one of which pertained to the district attorney's argument (Vol. XIV, pp. 2511–2512):

During the closing argument, the prosecutor connected the evidence of Otis Lee Fairley's prior trial and conviction to Samuel Johnson's case. "This case has been in my office since December the 31st, 1981. I've tried similar cases, two other similar cases, and it's a good thing they didn't ask me what I saw; because I see right now what you do, a murderer. Thats [sic] all.... I see a man fighting for his life against the likes of Charles Montgomery and Otis Fairley and Samuel Johnson, convicted murders ... I've tried two other cases just like this and I've seen what they've tried to do two times before this and I've seen what they've got away with and I see it here and it makes me mad and there ain't nothing I can do about it but pray to God that y'all see through it." (T. Trial at 1622, 1626, 1627). There was no evidence presented of prior murder convictions of Samuel Johnson or Charles Montgomery.

On his appeal, Johnson's counsel has found further statements objectionable.

[2, 3] We must first observe that the state and defense counsel should be given wide latitude in their arguments to a jury. This is inherent in, and indispensable to, our adversary system. Courts should be very careful in limiting the free play of ideas, imagery and the personalities of counsel in their argument to a jury.

[4–6] We next observe it is the duty of a trial counsel, if he deems opposing counsel overstepping the wide range of authorized argument, to promptly make objections and insist upon a ruling by the trial court. The trial judge first determines if the objection should be sustained or overruled. If the argument is improper, and the objection is sustained, it is the further duty of trial counsel to move for a mistrial. The circuit judge is in the best position to weigh the consequences of the objectionable argument, and unless serious and irreparable damage has been done, admonish the jury then and there to disregard the improper comment. See: *Wilson v. State*, 234 So.2d 303 (Miss.1970) at 308; *Aldridge v. State*, 180 Miss. 452, 177 So. 765 (1938) at 456; *Matthews v. State*, 148 Miss. 696, 114 So. 816 (1927) at 701.

[7] Defense counsel chose not to follow this familiar path, but to wait until the conclusion of the argument to object. This is quite illogical and extreme, and places the state in a "Catch 22" situation. To allow defense counsel to argue at conclusion of argument, to which no objection has been made, he is then entitled to a mistrial is not only inviting error, but also preventing the trial judge from taking the one step he could have taken to remove the possibility of prejudice. We cannot countenance assigned errors based on this sort of a proceeding.

There was not a single statement made by the district attorney, which, even if there were impropriety, could not have been immediately corrected by an objection being sustained, and an admonishment by the court.

Moreover, we have studied the entire argument of the prosecuting attorney. He perhaps made statements he should not have, strong. He was not complimentary of defense counsel. Neither was defense counsel complimentary of the district attorney. It is a common tactic, in one way or another, to diminish your adversary's case by reflections on his attorney. If it becomes too blatant, an objection should be sustained.

The complaint of the prosecution's argument include calling upon the Deity, making reference to the personal friendship of the district attorney and the victim, personal remarks directed to defense counsel, personal belief in Johnson's guilt, and frustration in prosecuting these cases. Every one of these complaints could have been quickly dissipated by a contemporaneous objection and ruling by the circuit judge.

Moreover, no appellate court would be warranted in reversing this case on the basis of the argument made by the district attorney.

III.

REFUSAL OF A CONTINUANCE

Johnson was indicted January 18, 1982. On March 1, 1982, the circuit judge entered an order specially setting the cause for trial July 13, 1982, in the Circuit Court of Covington County. On June 3, 1982, Johnson made a motion for a change of venue. On June 21, 1982, the circuit judge entered an order sustaining the motion, transferring the cause to Pike County, and setting the cause for trial August 30, 1982.

The record in this case reveals thorough and aggressive defense counsel. At least thirty pre-trial motions of one kind or another were made.

Inexplicably, defense counsel waited until August 30, 1982, to file a motion for a continuance on the ground two witnesses purported to be "forensic scientists" would be "out of the country" for the week beginning August 30. The motion further stated these witnesses had viewed all the evidence and prepared extensively from a "scientific point of view," and would be called as witnesses in the defendant's case in chief. Johnson filed no affidavit with the motion. Defense counsel Diaz attached an affidavit to postpone the trial thirty days in order to study the trial transcripts of trials of Montgomery and Fairley, which stated nothing, however, about the absent witnesses.

On August 18 there was a colloquy with the court about these witnesses, the circuit judge stated he had no knowledge as to

what they would testify, and got a general answer they were experts and would help defense counsel try the case.

[8] This motion contained almost none of the essential ingredients we have consistently required under Miss.Code Ann. § 99-15-29 (1972) to justify a continuance of a cause. It was also contemptuous of the obligation every trial counsel owes a court to wait until ten days before the pre-determined trial date to inform the circuit judge of the unavailability of these two witnesses, as shown by the facts in this particular case.

This assignment of error is frivolous.

IV.

LIMITATION OF CROSS EXAMINATION OF FIELDS

Prior to his death, Patrolman Langham had killed a black man. The state made a motion in limine to prevent Fields from testifying to this fact, which the circuit judge sustained. (Vol. V, p. 775)

The mere fact Langham had previously killed a black man in and of itself had no relevancy to this case. In order to make evidence of this fact competent in this case it was incumbent on the defense to in some manner demonstrate its relevancy.

No attempt was made to do so either before or during trial. It was not error, therefore, for the court to sustain the motion.

In Johnson's hearing on his motion for a new trial, conducted September 15, 1983, approximately one year following his trial, the circuit judge was presented with the following affidavit executed by Fairley on September 15, 1983 (Vol. XIV, p. 2520):

Before me the undersigned authority personally appeared Otis Lee Fairley who after being duly sworn deposes and says:

My name is Otis Lee Fairley. I grew up in Covington County. Anthony Fields is my first cousin, my father and his mother are brother and sister. Anthony Field's mother has lived for the last several years in Collins, Covington County Mississippi.

At Samuel Johnson's trial, I was not allowed to testify to a conversation between Anthony Fields and I in the Simpson County Jail in January, 1982, at which time he told me that the Highway Patrolman, Billy Langham, had murdered a black person in Jeff Davis County Ten (10) months before we were stopped. I asked Anthony Fields why he had to kill the Highway Patrolman instead of just coming to the car. He told me that he knew the Highway Patrolman had murdered a black person and that if he let him go he thought the Highway Patrolman would go for his gun and kill us before we could leave.

[9] On appeal Johnson argues he was prevented from introducing the *statement* allegedly made by Fields to Fairley as to why he, Fields, shot Langham. No such attempt to introduce such statement was ever made, by asking either Fields or Fairley if it was made. Had defense counsel done so, we would have an entirely different question on competency.

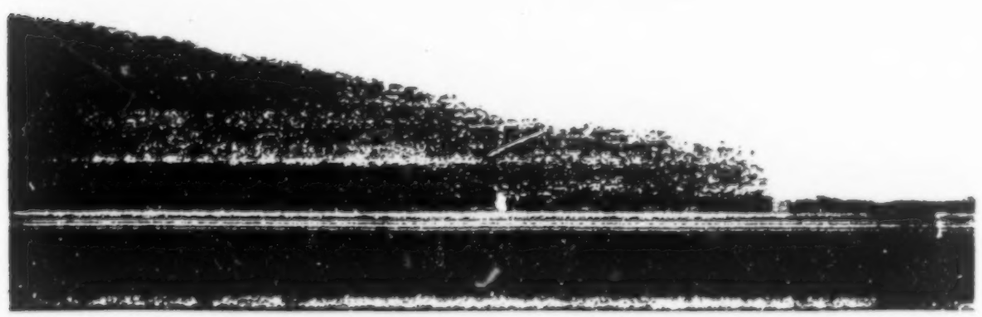
In looking at this record, we could not believe the state would have objected to the admissibility of this statement for either evidentiary or strategic reasons. The concluding sentence of this affidavit as a reason for killing Langham is nonsensical.

It is worth noting that during trial Fairley was given the opportunity on cross-examination to answer why Fields would have shot Langham, but only stated: "He knew all the officers from Covington County." (Vol. XI, p. 1908) There is no merit to this contention.

V.

INSTRUCTION ON CAPITAL MURDER

[10] Johnson argues the court's instruction failed to embrace the statutory requirements of murder and capital murder, and also to require the state to prove intent on his part to commit murder. See: Miss. Code Ann. § 97-3-19(1)(a), and (2)(a).



Instruction C-7 reads in pertinent part (Vol. XII, pp. 1989-1990):

The defendant, Samuel Johnson, has been charged by an indictment with the crime of capital murder for having wilfully, unlawfully, feloniously, of his malice aforethought and without authority of law kill and murder Billy Morris Langham, a human being, and that the said Billy Morris Langham was a peace officer at the time of the alleged murder, and that at the time of the alleged murder Pilly Morris Langham was acting in his official capacity as a peace officer, and that at the time of the alleged murder the defendant, Samuel Johnson, knew that Billy Morris Langham was a peace officer acting in his official capacity.

If you find from the evidence in this case beyond a reasonabely [sic] doubt that:

1) The defendant, Samuel Johnson, aided and commanded Charles Montgomery to commit capital murder by stabbing Officer Billy Morris Langham with a knife and ordering Charles Montgomery to shoot Officer Billy Morris Langham; and

2) That Charles Montgomery wilfully, unlawfully, feloniously and of his malice aforethought and without authority of law kill and murder Billy Morris Langham a human being, by shooting said Billy Morris Langham with a .357 Magnum pistol; and

3) That Billy Morris Langham was a peace officer, to-wit: a member of the personnel of the Mississippi Highway Patrol; and

4) That Billy Morris Langham was acting in his official capacity as a peace officer at the time of his death; and

5) That the defendant, Samuel Johnson, then and there had knowledge and knew that the aforesaid Billy Morris Langham was acting in his official capacity as a peace officer aforesaid; and

6) That said killing and murder of Billy Morris Langham occurred on the 31st day of December, 1981 in Covington County, Mississippi

then you should find the defendant, Samuel Johnson, guilty of capital murder, and the form of your verdict may be:

"We, the jury, find the defendant, Samuel Johnson, guilty of capital murder."

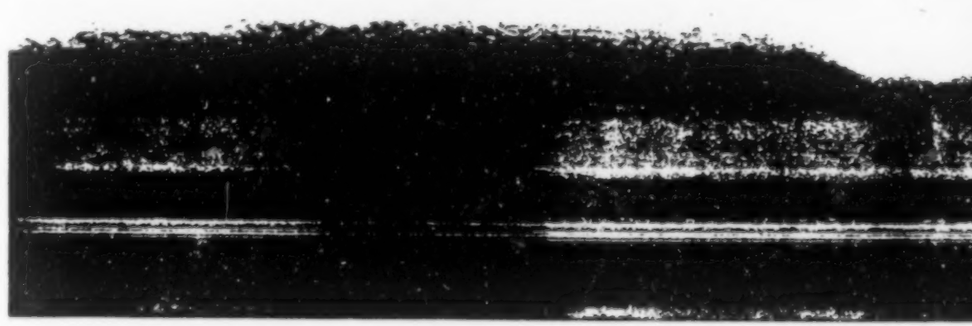
If you find the State has failed to prove any one of the essential elements of the crime of capital murder, you must find the defendant not guilty of capital murder and you will proceed with your deliberations to decide whether the State has proved beyond a reasonable doubt all the elements of the lesser crime of murder less than capital.

It can be readily observed that the first part of C-7 requires intent on the part of Johnson to kill Langham, and knowledge that he was killing a peace officer acting in his official capacity. The following paragraph with its six sub-parts clearly define the acts necessary to come within the capital murder framework. The jury could not have been misled by this instruction. It was never the contention of Johnson, either in the circuit court or on appeal, that the slaying of Langham was not a capital murder. His defense was he had nothing to do with the slaying. We do not have the situation of two parties engaged in a felony, and one without the actual knowledge or consent of the other committing a murder, also. The authorities cited by Johnson are inappropriate.

Moreover, defense counsel approved these instructions by the circuit court. *Williams v. State*, 445 So.2d 798 (Miss. 1984) at 807; *Rayburn v. State*, 312 So.2d 454 (Miss.1975) at 455; Rule 42 Miss. Sup.Ct. Rules.[1]

1. The state's only answer to this assignment of error in its brief was that it was waived. We have also addressed the assignment on its merits.

While the state is correct the point was waived, we think a word of caution is in order. When the state fails to answer an assignment of error on the merits, and rests its case with the contention the point has been waived, it places



aforesaid:

er of Bi-
l on the
Coving-

int, Sam-
murder,
may be:
fendant,
tal mur-

ailed to
lements
ou must
capital
th your
he State
oubt all
of mur-

he first
part of
wledge
cting in
g para-
define
he capi-
uld not
on. It
either
hat the
al mur-
g to do
ve the
a felo-
wledge
a mur-
hnson

proved
court.
(Miss.
So.2d
Miss.

it was
order
ment of
ith the
places

VI.

EVIDENCE OF PLEA AND SENTENCE OF STATE'S WITNESS

During the state's questioning of Fields, it was brought out that he pleaded guilty and had been sentenced to twenty-five years for his part in this crime. In closing argument the district attorney argued that it was necessary to do this to bring the parties responsible for the officer's death to justice.

The language of this Court in *Buckley v. State*, 223 So.2d 524 (Miss.1969), under unusual facts has been the basis for numerous assignments of error. It is time we distinguish *Buckley* from the usual case.

Let us take the ordinary case in which two or more people are charged with the commission of a crime, and it is necessary that one of the participants in the crime testify for the state in order to make out a case against any of them. Frequently, the state will choose the person whose participation is not as great, or whose guilt is not as reprehensible, or who has readily confessed. Generally speaking, there are good, and at times compelling reasons for the state's choice among those accused to be the witness for the state.

It is not the function of the court, however, to tell the state which witness among the accused persons to select as the witness for the state. It is the right of the state to select which witnesses it deems proper to testify on its behalf.

[11] While it is the sole responsibility of the circuit judge to sentence each accused who has been convicted or pleaded guilty, it is not improper for a circuit judge to take into consideration in his sentencing that such person is cooperating with, and will be a witness for the state in the prosecution of other defendants.

A co-conspirator, co-defendant or co-indictee who has been thus favored, however, is a marked man before the jury. There is a big question mark placed upon his testimony by the law, and indeed the accused on trial is entitled to an instruction that his testimony is to be viewed with caution.

One of the best weapons for defense counsel to further arouse the distrust of the jury in the testimony of such witness is to ask him on cross-examination whether he has been sentenced or not for his participation, and if so, the sentence he has received. Invariably, if he has been sentenced, it will be much lighter than the sentence the man on trial can receive and, if he has not been sentenced, defense counsel can exploit even more the weakness and untrustworthiness of the testimony from such a witness.

These observations are to point out that in the ordinary case, if the state did not on direct have such witness testify as to his plea of guilty and sentence, defense counsel on cross-examination most assuredly would. Indeed, defense counsel would be derelict in his duty to his client not to point this out to the jury, so as to show a very special interest the witness has in his own testimony.

In closing argument, defense counsel has no better weapon to demonstrate the weaknesses of such testimony, the disparity of the sentence received by the state's witness, and the sentence which the court can inflict upon his client. Indeed, even though the state brings out on direct examination the plea of guilty, defense counsel invariably will further exacerbate the state's problem on cross-examination of such witness and hammer away at the disparity in treatment in final argument.

What harm has resulted, then, by the state making this concession in its examination in chief?

In the ordinary case, none.

Buckley presented a special set of facts. Buckley and one Billy Roy Pitts were indicted for kidnapping. At Buckley's first trial, Pitts testified as a witness for Buckley, corroborating Buckley's testimony.

itself in some jeopardy. We do not know whether in so doing the state is conceding that

if the point in fact was not waived, it is meritorious.

This trial ended in a mistrial when the jury failed to reach a verdict. Prior to the second trial, Pitts pleaded guilty to the charge, and at Buckley's second trial testified as a witness for the state. His testimony in the second trial corroborated the testimony of the kidnap victim, and contradicted Buckley's.

Over the objection of Buckley, the state was permitted to prove Pitts had pleaded guilty and then sentenced to serve five years. We found this to be reversible error there because proof of the plea of guilty *over Buckley's objection* had the effect of bolstering the testimony of an admitted perjurer. We stated:

> Appellant assigns as error the action of the trial court in overruling his objection to that part of the testimony of Pitts wherein he testified that he had been jointly indicted on the charge of Kidnapping Jack Watkins and that he had plead guilty to that charge, and as a result of his plea of guilty, had been sentenced to serve a term of five years in the state penitentiary. The overruling of this objection and admission of this testimony was reversible error. The law is well settled in this state that where two or more persons are jointly indicted for the same offense but are separately tried, a judgment of conviction against one of them is not competent evidence on the trial of the other because such plea of guilty or conviction is no evidence of the guilt of the party being tried. *State v. Thornhill*, 251 Miss. 718, 171 So.2d 308 (1965); *Pieper v. State*, 242 Miss. 49, 134 So.2d 157 (1961); *Pickens v. State*, 129 Miss. 191, 91 So. 906 (1922). Not only was this testimony designed to lead the jury to believe that since Pitts had plead guilty to the charge, that his co-indictee, Buckley, was also guilty, but it was also designed to bolster the testimony of Pitts. On the first trial of this case Pitts testified and his testimony in that trial corroborated Buckley's version of what happened. On this trial he testified directly contrary on the crucial issues. The state was aware that the evidence that Pitts had plead guilty to the same charge since the former trial would add weight to his testimony. It had the effect of bolstering the testimony of an admitted perjurer. [223 So.2d at 527–528]

The *Buckley* rationale is not present in this case. Indeed, defense counsel made no objection to the state's elicitation in its direct examination of Fields that he had pleaded guilty and been sentenced for his part in the crime. Defense counsel had excellent reason not to object, this was a fact very much in Johnson's interest with which to acquaint the jury.[2]

[12, 13] We do not overrule *Buckley*, but neither do we extend its holding beyond the unusual situation of that case. If defense counsel under some unusual case wishes to withhold from the jury the fact that a co-indictee testifying for the state has pleaded guilty and received a lesser sentence, he has a duty to object to the testimony offered by the state. This duty is more compelling in a case of this sort than in the usual case in which we have held that failure to object to testimony waives any assignment of error on appeal.

To permit this defendant to say nothing at trial, and complain for the first time in post-trial proceedings presents a classic case of having your cake and eating it, too.

VII.

REFUSAL OF INSTRUCTION

Johnson complains of the circuit judge's refusal of requested Instruction D–15 (Vol. XII, pp. 2025–2026). This instruction would have authorized the jury to separately consider whether he was guilty or not of the crime of being an accessory after the fact.

2. It is interesting that in this case one of the pre-trial motions was to require the state to disclose any agreement it had made with any prosecuting witness that would influence his testimony, because such agreement would affect the credibility of the witness, and the "trial jury is entitled to know it." [Vol. II, p. 262]

[14] No authority is cited in support of this contention, and it is without merit. Johnson was on trial for capital murder, and he was entitled to instructions fully embodying all the elements of this crime, and further that in the absence of proof such elements, he was entitled to an acquittal. He was not entitled, however, to have the jury separately instructed and separately to consider whether or not he was guilty of being an accessory after the fact. See: *Wilcher v. State*, 455 So.2d 727 (Miss. 1984).

SENTENCING PHASE

VIII.

DENIAL OF FUNDS FOR OUT-OF-STATE WITNESSES

The record reveals that on motion by defense counsel, the court awarded expenses to counsel to travel to New York and interview prospective witnesses.

On August 28, 1982, defense counsel filed a motion for compulsory process and attendance fees, as well as travel expenses, for twenty-one prospective witnesses. Attached to the motion is an appendix summarizing the content of their knowledge of Johnson. From the summary of their proposed testimony, it is clear they were character witnesses.

[15, 16] While under the holding of the United States Supreme Court in *Eddings v. Oklahoma*, 455 U.S. 104, 113–115, 102 S.Ct. 869, 876–877, 71 L.Ed.2d 1 (1982), it might have been proper in the sentencing phase of the trial to have such witnesses testify on Johnson's background, that case is not authority for the proposition that a state is required to furnish travel expenses for out-of-state prospective character witnesses. Moreover, the State of Mississippi is without authority to compel the attendance of out-of-state defense witnesses in a criminal case. See: *Diddlemeyer v. State*, 234 So.2d 292, 295 (Miss.1970). Under Article 3, Section 26 of our Constitution an accused is entitled to compulsory process for witnesses in his favor. The state's only power, however, is to reach witnesses within the state.

[17] In any event, before a circuit judge should be criticized, defense counsel at a minimum, was under a duty to furnish detailed statements in affidavit form from each of these proposed witnesses as to what their testimony would be in the trial of the case. In this case the only thing presented to the circuit judge was a summary by counsel, not sworn to, as to what these witnesses might testify.

IX.

IMPROPER ARGUMENT IN SENTENCING PHASE

In complaining of improper argument of the district attorney during the sentencing phase, Johnson contends the state led the jury to believe if he were sentenced to life, he would eventually be paroled. Pertinent parts of the argument for the state and defense are as follows:

CLOSING ARGUMENT

ON BEHALF OF THE STATE

BY MR. EVANS:

Now, what you're considering is serious business. It's about as serious as it gets in our law and in our lives. And a lot of good-hearted and well-meaning people who don't understand the purpose and the necessity of capital punishment will probably say that I'm very cold and harsh and cruel when I stand here and I say that because of having been convicted of second degree assault with intent to commit first degree rape and capital murder that Samuel Johnson should die.... [Vol. XIII, p. 2276]

* * * * * *

This makes the tenth time that I have either tried or prepared for trial a capital murder case, and if Mr. Johnson's lawyers argue like all those others I've been involved in, they'll ask you for mercy, they'll ask you for compassion, and they'll ask you for compassion, if they're like the others and tell you that Samuel Johnson doesn't want to die. Billy didn't want to die either. And if they argue like the others, they'll ask you for mercy and plead for Samuel Johnson's life. Billy plead for his life. But mercy wasn't in the heart of Samuel Johnson last New Year's Eve when he told Charles Montgomery twice to shoot.... [Vol. XIII, p. 2277]

CLOSING ARGUMENT

ON BEHALF OF THE DEFENDANT

BY MR. HARPER:

. . The only thing I'm here to do right now is to ask you to spare his life. And Mr. Evans is right, I am getting up here asking for mercy. I am asking you to spare his life.

I want you to remember what Dr. Fisher said. And on this Instruction, PS–2, that Mr. Evans has referred to, there are several things that you are to consider as mitigating circumstances. I want you to study this instruction when you get back there and I want you to remember what Dr. Fisher said, that he can function in prison with that life sentence and not be violent. [Vol. XIII, pp. 2279–2280]

* * * * * *

I ask you to study the instruction here and remember those things, and I ask you to think about what it's going to be like if he goes to the gas chamber, what it will be like there, and I ask you to spare his life. [Vol. XIII, p. 2281]

FINAL CLOSING ARGUMENT

ON BEHALF OF THE STATE

BY MR. EVANS:

I can tell you what it's like. It's a gray room all the way around about like this and there's a bench in it and under that bench, there is a pail of water and above that are two pills, and the Sheriff pulls the handle that drops those pills into water. Then Sam Johnson will take a deep breath and in five to ten seconds his life will be ended. There will be no pain, there will be no agony, there will be no suffering. He won't feel a knife in his back and he won't feel a bullet exploding in his brain. And that's what it's like.

Dr. Fisher said that Samuel Johnson can adapt to prison life. My first response was that we're not here to see how Sam Johnson will adapt to prison life. What concerns me is what is going to happen the next time he decides to commit a second degree assault with intent to rape and what is going to happen the next time he decides he wants a Highway Patrolman or another law enforcement officer dead. You heard Dr. Fisher's testimony that inside prison his potential for violence was low, but outside, it was high. I just can't get concerned about how he would adapt to prison life when I know that his potential for dangerousness on the outside is high. [Vol. XIII, p. 2282]

* * * * * *

... [W]e have a system that really does work after all. And, as I told you before, I will now, in the name of that system and the decent, law-abiding people in Mississippi, and by the authority that the ones in the Thirteenth District gave me, I'm going to ask that you retire and come back in a little while and tell Judge Pittman by your verdict, yes, we find that the aggravating circumstances do outweigh the mitigating circumstances we find that a man who commits second degree assault with intent to commit first degree rape and a man who has been returned to the penitentiary again and again and again, spent 10 of the last 18 years in the penitentiary, and a man who has a high potential for hurting other people and a man who has taken an innocent life when he killed an officer while that officer was enforcing the laws of our good people, has chosen himself to forfeit his life in the eyes of God and in the eyes of our law. You are not the one executing Samuel Johnson. Regardless of what they tell you, you're not the one

He chose that himself when he decided to be a criminal in 1963. So, as I said, I now ask you to retire and return shortly and tell Judge Pittman that the aggravating circumstances outweigh the mitigating circumstances and because of that, Samuel Johnson should suffer the penalty of death. [Vol. XIII, p. 2287]

In *Hill v. State*, 432 So.2d 427, p. 439 (Miss.1983); and in *Wiley v. State*, 449 So.2d 756, p. 761 (Miss.1984), we condemned an argument which intimated to the jury that their decision "was not the last word."

In *Wiley*, we likewise disapproved an argument by the prosecution which stresses that any sentence to life imprisonment inevitably means parole for the convicted person, rather than having to serve his entire life in prison.

[18] It is clear from the argument from the prosecution in this case that the district attorney never reached the type of argument which we condemned in *Hill*, supra, or in *Wiley*, supra. The argument made was in answer to the argument of defense counsel, and was fair argument.

In addition to this, defense counsel made no objection whatever to the argument by the state. As we have stated many times, and again in *Hill*, we are not obligated to review any assignment of error for closing argument in which there was no objection made during the trial.

We have carefully reviewed the entire argument by the state and defense counsel, and we find no reversible error for any statement made by the prosecution.

X.

SENTENCE NOT DISPROPORTIONATE

[19] It is the duty of this Court under Miss.Code Ann. § 99-19-105(3)(c) to review the proportionality of every death sentence. We also have this responsibility under decisions of the United States Supreme Court, as well as our own. See: *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); *Billiot v. State*, 454 So.2d 445 (Miss.1984); *Dufour v. State*, 453 So.2d 337 (Miss.1984); and *Neal v. State*, 451 So.2d 743 (Miss.1984).

[20] Under the facts of this case, the jury was warranted in believing Johnson an active participant, if indeed not the leader, in a deliberate, brutal slaying of a peace officer carrying out his duties. In the absence of the abolition of the death penalty, no appellate court is justified in holding that the jury, having found Johnson guilty, could not also return a death penalty verdict under these facts.

[21] The very word "murder" embraces within its meaning cruelty, brutality and an evil intent carried to the ultimate in harm: death. It is redundant to characterize a murder as cruel, brutal or malicious.

Civilized society must place its dependence on peace officers. They preserve the peace, protect us from harm, and pursue the wrongdoer. They are the front line infantry in society's eternal struggle with crime.

[22] The murder of a police officer in the line of duty must be equated with treason or espionage in time of war. Such a crime warrants the most severe punishment society exacts.[3]

We are not persuaded by Johnson's first argument that his case comes under the proscription of *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). That case involved a defendant who was a participant in a robbery, but who had nothing whatever to do with the slaying of the robbery victims.

Nor, is there any merit to Johnson's second argument that because Fairley and Montgomery in separate capital murder trials received verdicts of life imprisonment from the juries, Johnson could only be sentenced to life. See: *Bullock v. State*, 391 So.2d 601, pp. 612-614 (Miss.1980);

3. It follows this case is not disproportionate to the sentences imposed in other capital murder cases. See "Appendix A" for cases considered by this Court in this case.

XI.

PRECLUSION OF EVIDENCE OF SENTENCES OF CO-DEFENDANTS

[23] Somewhat more troublesome is Johnson's argument that the circuit judge erred in excluding from consideration by the jury during the sentencing phase that the juries trying Fairley and Montgomery had rendered life sentence verdicts. Clearly, under *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), Johnson was entitled to have his trial jury consider "any relevant mitigating circumstance."

[24] Were the life sentences of Fairley and Montgomery *relevant mitigating circumstances?*

We must hold they were not. Suppose, for example, the juries which tried Fairley and Montgomery had returned death penalty verdicts? Would the state, under any theory, have been permitted to show this over Johnson's objection? Each case tried by a separate jury must stand on its own. Otherwise, the jury trial is pointless.

Moreover, for the separate sentences of Fairley and Montgomery to have had any meaning in Johnson's, it would have been necessary to develop all the facts of each of their trials for this jury.

Johnson cites two Florida cases, both of which are distinguishable. In *Messer v. State*, 330 So.2d 137 (Fla.1976), the Florida Supreme Court held the trial court erred in excluding from consideration by the jury during sentencing phase the plea bargained second degree murder sentence received by a co-defendant. As we stated, supra, Johnson in this case was clearly entitled to have the jury know and consider the guilty plea and sentence of Fields. This is quite different from the convictions of Fairley and Montgomery.

Slater v. State, 316 So.2d 539 (Fla.1975), involved a circuit judge overruling a jury recommendation of life imprisonment and imposing the death sentence, a procedure authorized under the Florida statutes. The Florida Supreme Court in turn overruled the circuit judge's imposition of the death sentence, the main reason being that an equally culpable defendant had been authorized to plead *nolo contendere* to first degree murder and received a life sentence.

Thus, it is clear the Florida cases have no application to this case.

XII.

SENTENCING INSTRUCTION PS-2

Johnson's first complaint on this instruction is that it did not provide a "principled basis for distinguishing this case from the many other murder cases in which the death penalty was not imposed under the statute." His supporting argument is somewhat amorphous, nebulous, which we would be inclined to ignore in a less somber case. As we construe it, he argues that including as an aggravating circumstance his 1963 conviction of assault to commit rape did not channel the sentencing jury's discretion by "clear and objective standards."

[25] We note that Miss.Code Ann. § 99-19-101(5)(b) authorizes the sentencing jury to consider as an aggravating circumstance, "the defendant was previously convicted ... of a felony involving the use or threat of violence to the person." Contrary to Johnson's assertion, this is a clear and objective standard, fulfilling the guidelines of the United States Supreme Court in *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), and as further stated by *California v. Ramos*, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983); and *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

[26] It is not the purpose of Federal appellate review to deny to the states the authority to and responsibility for determining the aggravating circumstances which justify a death penalty. *Gregg v.*

Georgia, supra; *Zant v. Stephens*, supra; *California v. Ramos*, supra; and *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976).

[27] Nor is it the function of this Court to curtail this authority vested in our legislature. We cannot say the legislature had no constitutional authority to include this as an aggravating circumstance in a death penalty case.

[28] Johnson further claims, without citing authority, that the conviction was too remote in time to be considered as an aggravating circumstance. Again, we are not prepared to deny the legislature had the power and lawful authority to include this aggravating circumstance in the instruction on the facts in this case. We note the circuit judge wisely and humanely permitted Johnson to include in the instruction as a *mitigating circumstance* the remoteness in time of this conviction. Johnson was thus permitted to argue to the jury the point he asserts here, and in this argument he had the approval of the court's own instruction. Cf. *Zant v. Stephens*, supra; *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980).

Nor do we find merit in Johnson's next contention that the record does not support a consideration by the jury as an aggravating circumstance that Johnson committed the murder for the purpose of avoiding arrest.

Finally, he argues the record does not support a jury consideration whether the murder was especially heinous, atrocious and cruel. But, see: *Booker v. State*, 449 So.2d 209 at 220–221 (Miss.1984); *Caldwell v. State*, 443 So.2d 806 (Miss.1983) at 814–815; and *Irving v. State*, 441 So.2d 846 (Miss.1983) at 849–850.

JOHNSON'S SUPPLEMENTAL BRIEF

Johnson filed a supplemental brief containing seven additional assignments of error.

XIII.

WAS THERE A DISCOVERY VIOLATION?

Simpson County Jail inmate Norman Shelly was called by the state as a rebuttal witness at the guilt phase of appellant's trial. [Vol. XI, pp. 1928–1930] Shelly testified he overheard a conversation between Johnson and cellmate and co-indictee Otis Lee Fairley in which, without objection by defense counsel, the following transpired at trial:

Q. Tell me what you heard Mr. Johnson and Mr. Fairley say. Without telling anybody else.

A. I overheard them talking about how one took the knife off the top of the car.

Q. Which one was that?

A. And gave it to the other one. Otis took the knife off the top of the car and gave it to Sam.

Q. What did Sam say, if anything, if you remember?

A. I don't know. I can't remember where—he just stated that was the fact, the way he took the knife and *used the knife*.

Q. Is that the gist of the conversation as best you can remember it?

A. Yes, sir.

[Vol. XI, p. 1930] [Emphasis added]

There was no objection and the defense cross-examined Norman Shelly. In this appeal the appellant pleads complete surprise and that he had no opportunity to interview the witness concerning this statement.

Defense made two motions before trial which in this assignment of error he asserts have been violated. The first was a motion for disclosure of witnesses, all evidence favorable to accused and discovery and inspection [Supplemental Abstract, pp. 389–390; Vol. II, pp. 207–210], which was granted. [Supplemental Abstract, p. 391; Vol. V, p. 706] The second was a motion to supress written or oral statements made to Johnson by any investigating officer [Supplemental Abstract, pp. 392–393; Vol. II, pp. 224–226], which was granted as conceded by the D.A. *Tolbert v. State*, 441 So.2d 1374, 1375 (Miss.1983).

[29] Johnson claims in this assignment the admission of the above conversation into evidence was reversible error because the prosecutor deliberately violated a court suppression order. He complains the suppression order directed that "no statement of the defendant regarding the facts can be used against him at the trial of this cause."

Contrary to what Johnson now asserts, the above conversation was not embraced in any discovery motion or discovery order.

Johnson's brief contains the following astonishing statements: "Shelly's testimony came as a complete surprise to the Appellant. Defense Counsel had no opportunity to interview the witness concerning the statements attributed to the Appellant." [sic] [Supplemental Brief, p. 1]

If this were the case, why did defense counsel make no objection? Further, the admission of this testimony was not assigned as error in the detailed motions for new trial. On appeal, Johnson has changed counsel. Johnson and his counsel go outside the record in claiming Shelly's testimony came as a complete surprise. No such claim appears in the record.

To permit a defendant and his counsel in any case, including a death penalty case, to sit idly by and make no objection to questionable testimony, exacerbate the matter still further by ignoring the testimony in the motion for new trial, and argue for the first time on appeal the admission of such testimony, would countenance the laying of a trap in every case. This is especially true where, as in this case, there has been a change in defense counsel.

In the first place, from this record we do not know if Johnson's counsel was unaware of this proferred testimony prior to trial. In the second place, it is clear from this record Johnson was ably represented by thorough defense counsel, and there may have been a very good reason why no objection was made.

The facts of this case are clearly distinguishable from *Tolbert v. State*, 441 So.2d 1374 (Miss.1983), and there is no merit in this assignment.

XIV.

VIOLATION OF RULE IN PERMITTING THE SHERIFF TO TESTIFY

[30] In rebuttal Sheriff Lloyd Jones testified. Johnson complains that Sheriff Jones should not have been permitted to testify in rebuttal to deny he had a conversation with a defense witness Carl Lee. The reason is that Jones was not excluded from the courtroom when the rule was invoked. Permitting an officer of the court to remain in the courtroom is discretionary with the trial court. See: *Bell v. State*, 443 So.2d 16 (Miss.1984).

XV.

WAS DEFENDANT BROUGHT IN THE PRESENCE OF THE JURY IN HANDCUFFS?

[31] Johnson goes outside the record and claims that he was brought into the courtroom in the presence of the jury in handcuffs. The record does not support this claim. Indeed, the record indicates that the court saw to it that this would not occur. [Vol. VIII, p. 1250]

XVI.

ADMISSION OF CHECKS FOUND IN AUTOMOBILE, WHICH CONTAINED FINGERPRINTS OF JOHNSON AND LANGHAM

[32] The trial court permitted the introduction into evidence of checks found in the automobile, after ruling that they could only be referred to as "documents." [Vol. IX, pp. 1506–1511] These documents were not circulated to the jury but the fingerprint expert referred to them in his identification as having the fingerprints of Johnson.

XVII.

FAILURE TO PROVIDE JOHNSON WITH COUNSEL AT THE ARRAIGNMENT HEARING

[33] Johnson complains, without citation of authority, the state failed to provide him with counsel at the "initial appearance hearing." He states this violated his constitutional rights. The record does not support this contention. [Vol. IV, p. 605, et seq.]

XVIII.

EXCLUSION OF JURORS WHO HAD CONSCIENTIOUS SCRUPLES AGAINST INFLICTION OF DEATH PENALTY

[34] Johnson argues that it was error to exclude in the guilt phase of his trial jurors who clearly had fixed conscientious scruples against infliction of the death penalty. There was no error in excluding such jurors. See: *Wilcher v. State*, 448 So.2d 927 (Miss.1984); *Sonnier v. Maggio*, 720 F.2d 401 (5th Cir.1983); *Smith v. Balkcom*, 660 F.2d 573 (5th Cir.1981); *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir.1978); and *Woodard v. Hutchins*, 464 U.S. 377, 104 S.Ct. 752, 78 L.Ed.2d 541 (1984).

XIX.

THE ADMINISTRATION OF THE DEATH PENALTY IN THIS STATE IS ARBITRARY AND DISCRIMINATORY IN VIOLATION OF THE APPELLANT'S EIGHTH AND FOURTH AMENDMENT RIGHTS

Johnson claims that he was denied a request to present evidence on the death penalty being administered in an arbitrary and discriminatory manner. The record reveals Johnson made a motion to strike and quash as unconstitutional the death penalty statute (Vol. II, pp. 239-243) and the hearing his counsel requested on the motion was held by the court. (Vol. IV, pp. 605-709).

[35] Nothing offered by Johnson supports his contention that the death penalty is being administered unfairly because of either his or the victim's race.

PART B.

ROY NOBLE LEE, Presiding Justice, for the Court:

THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY ON THEIR OPTION TO RECOMMEND A LIFE SENTENCE EVEN IF AGGRAVATING CIRCUMSTANCES WERE FOUND TO OUTWEIGH MITIGATION.

The requested instruction, which was refused by the court, follows:

> The court instructs the jury that if you see fit, whether mitigating circumstances exist or not, you may recommend [sic] mercy for the defendant. This recommendation is solely in your discretion and not controlled by any rule of law. You may make such recommendation with or without a reason.

[36] The appellant contends that refusal of the instruction constituted reversible error. However, the question has been resolved against the position of appellant in three (3) felony murder cases wherein the death penalty was imposed, viz. *Bullock v. State*, 391 So.2d 601 (Miss.1981); *Jordan v. State*, 365 So.2d 1198 (Miss.1978); and *Hill v. State*, 432 So.2d 427 (Miss.1983). In *Hill v. State*, a similar instruction to that refused here was under consideration. The Court said:

> Argument of appellant is that reversible error was made by the trial court when it failed to grant the following sentencing information requested by the defense:
>
> Instruction D-2:
>
> Ladies and gentlemen of the jury, I charge you that you need not find any mitigating circumstance in order to return a sentence of life imprisonment. A life sentence may be returned regardless of the evidence.
>
> The appellant contends that this refusal had the effect of denying the jury the right to sentence him according to their feelings of mercy. He maintains that the jury was left with the impression

> that they were bound to return a verdict that the appellant should suffer the death penalty if they found that aggravating circumstances outweighed the mitigating circumstances from the evidence presented. According to him, this would be tantamount to a mandatory application of the death penalty and contrary to the mandate of individualized consideration handed down by the United States Supreme Court in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).
>
> We do not agree that the jury in the case in question was under any impression that they had no choice but to impose the death penalty. Their verdict was as follows:
>
> > We, the Jury, unanimously find that the aggravating circumstances . . . outweigh the mitigating circumstances and are sufficient to impose the death penalty, and that there are insufficient mitigating circumstances to outweigh the aggravating circumstances . . . .
>
> 432 So.2d at 441.
>
> The jury verdict in the case sub judice was almost verbatim to the verdict in *Jordan* and the same reasoning that applied there must prevail here.
>
> Juries may pardon an accused by a not guilty verdict, when his guilt is overwhelming from the record; they may exercise clemency toward one found guilty, where the statute permits juries to fix the punishment, and the verdicts will be upheld. However, trial judges are required to instruct juries, according to the law.
>
> The judgment of the lower court is affirmed and Wednesday, the 19th day of June, 1985, is set as the date for execution of the sentence and infliction of the death penalty in the manner provided by law.

AFFIRMED AS TO GUILT PHASE. AFFIRMED AS TO SENTENCING PHASE.

PATTERSON, C.J., WALKER, NOBLE LEE, P.JJ., and DAN M. PRATHER, ROBERTSON, SULLIVAN and ANDERSON, JJ., concur as to Part A.

HAWKINS, J., dissents as to Part B.

APPENDIX "A"

DEATH PENALTY CASES AFFIRMED BY THIS COURT:

Cabello v. State, 471 So.2d 332 (Miss.1985)
Billiot v. State, 454 So.2d 445 (Miss.1984)
Dufour v. State, 453 So.2d 337 (Miss.1984)
Stringer v. State, 454 So.2d 468 (Miss.1984)
Wilcher v. State, 455 So.2d 727 (Miss.1984)
Wilcher v. State, 448 So.2d 927 (Miss.1984)
Neal v. State, 451 So.2d 743 (Miss.1984)
Booker v. State, 449 So.2d 209 (Miss.1984)
Caldwell v. State, 443 So.2d 806 (Miss.1983)
Irving v. State, 441 So.2d 846 (Miss.1983)
Tokman v. State, 435 So.2d 664 (Miss.1983)
Leatherwood v. State, 435 So.2d 645 (Miss.1983)
Hill v. State, 432 So.2d 427 (Miss.1983)
Pruett v. State, 431 So.2d 1101 (Miss.1983)
Gilliard v. State, 428 So.2d 576 (Miss.1983)
Evans v. State, 422 So.2d 737 (Miss.1982)
King v. State, 421 So.2d 1009 (Miss.1982)
Wheat v. State, 420 So.2d 229 (Miss.1982)
Smith v. State, 419 So.2d 563 (Miss.1982)
Edwards v. State, 413 So.2d 1007 (Miss.1982)
Johnson v. State, 416 So.2d 383 (Miss.1982)
Bullock v. State, 391 So.2d 601 (Miss.1980)
Reddix v. State, 381 So.2d 999 (Miss.1980)
Jones v. State, 381 So.2d 983 (Miss.1980)
Culberson v. State, 379 So.2d 499 (Miss.1979)
Gray v. State, 375 So.2d 994 (Miss.1979)

APPENDIX A—Continued

Jordan v. State, 365 So.2d 1198 (Miss. 1978)
Voyles v. State, 362 So.2d 1236 (Miss. 1978)
Irving v. State, 361 So.2d 1360 (Miss. 1978)
Washington v. State, 361 So.2d 61 (Miss. 1978)
Bell v. State, 360 So.2d 1206 (Miss.1978)

DEATH PENALTY CASES REVERSED AS TO PUNISHMENT AND REMANDED FOR RESENTENCING TO LIFE IMPRISONMENT:

Edwards v. State, 441 So.2d 84 (Miss. 1983)
Dycus v. State, 440 So.2d 246 (Miss.1983)
Coleman v. State, 378 So.2d 640 (Miss. 1979)

DEATH PENALTY CASES REVERSED AS TO PUNISHMENT AND REMANDED FOR A NEW TRIAL ON SENTENCING PHASE ONLY:

Mhoon v. State, 464 So.2d 77 (Miss.1985)
Cannaday v. State, 455 So.2d 713 (Miss. 1984)
Wiley v. State, 449 So.2d 756 (Miss.1984)
Williams v. State, 445 So.2d 798 (Miss. 1984)

HAWKINS, Justice, dissenting as to Part B:

For the reasons stated in dissenting in *Hill v. State*, 432 So.2d 427, 453 (Miss. 1983), and also adopting the views of Justice Robertson in his dissent in *Leatherwood v. State*, 435 So.2d 645, 660 (Miss. 1983), I think the circuit judge erred in refusing to grant the instructions informing the jury it had the discretion to impose a life sentence upon Johnson, regardless of the evidence.

To me the jury system is sacred, a view apparently shared by the authors of our State Constitution, who wrote, "The right of trial by jury shall remain inviolate. . . ."[1] It is not rhetoric or oratory, at least to me, to assert there is more wisdom in juries than can ever be enunciated by judges.

We learned 100 years ago in this state, after at least 150 years' experience, that the jury should have the absolute right, and should be instructed by the Court that they and they alone had such right, to spare the defendant's life regardless of the evidence. See: *Spain v. State*, 59 Miss. 19 (1881).

We recognize that opinions from the U.S. Supreme Court, beginning in 1972, have drastically changed capital offense laws and procedures, but no U.S. Supreme Court decision has ever suggested this discretionary power be removed from the jury to *spare the defendant's life*. Rather, the channeling of the jury's discretion was to limit the circumstances under which it could impose the death penalty, not the reverse.

Yet, this Court has held the jury is not entitled to be instructed by the circuit judge that it has this sacred right.

In doing so we ignore history and human experience; we implicitly overrule *Spain v. State*. We denigrate the majesty of our jury system. I can only urge this Court some day to change the present majority holding. I hope circuit judges of this State will unanimously, as many already do, tell the jury as we said 100 years ago, they have the discretion, regardless of the evidence, to sentence the defendant to life imprisonment rather than death.

1. Mississippi Constitution, Article 3, § 31.

John L. DAVIS and Prentiss Brooks
v.
STATE of Mississippi.
Misc. No. 1154A.
Supreme Court of Mississippi.
June 5, 1985.
Rehearing Denied Oct. 2, 1985.

On petition for postconviction relief, the Supreme Court, Dan M. Lee, held that:

69 N.Y.2d 339

The PEOPLE of the State of New York, Respondent,
v.
Samuel Rice JOHNSON, Appellant.

Court of Appeals of New York.

March 24, 1987.

Defendant was convicted of second-degree assault by the Monroe County Court. Twenty-three years later, when assault conviction was used as aggravating factor at sentencing phase of murder prosecution, defendant sought to have assault conviction set aside. The Monroe County Court, Connell, J., resentenced defendant on assault conviction, and defendant appealed. The Supreme Court, Appellate Division, 509 N.Y.S.2d 789, affirmed, and defendant brought permissive appeal. The Court of Appeals held that: (1) statute, providing that time for appealing from original judgment is not revived by resentencing that occurs more than 30 days after original sentence was imposed, did not prevent defendant from obtaining appellate review of assault conviction which had been imposed 23 years earlier, and (2) statute, providing that defendant must seek extension of 30-day period for taking appeal no more than one year after 30-day period has expired, did not preclude such review.

Conviction vacated; indictment dismissed.

1. Criminal Law ⇐1069(6)

Statute, providing that time for appealing from original judgment is not revived by resentencing that occurs more than 30 days after original sentence was imposed, did not prevent defendant from obtaining appellate review of assault conviction which was imposed 23 years earlier, and which was used as aggravating factor at subsequent murder prosecution, where defendant had made timely and diligent pro se efforts to obtain review of conviction prior to effective date of statute, and defendant's efforts had been thwarted by State. McKinney's CPL § 450.30, subd. 3.

2. Criminal Law ⇐1069(6)

Statute, providing that defendant must seek extension of 30-day period for taking appeal no more than one year after 30-day period has expired, did not prevent defendant from obtaining appellate review of assault conviction which was imposed 23 years earlier, and which was used as aggravating factor in subsequent murder prosecution, where defendant had made timely and diligent pro se efforts to obtain review of conviction prior to effective date of statute, and defendant's efforts had been thwarted by State. McKinney's CPL § 460.30.

3. Criminal Law ⇐1187

Assault conviction which had been used as aggravating factor at subsequent murder prosecution would be vacated, and indictment dismissed, where defendant raised appealable issues of possible merit, and State conceded that records of assault prosecution had been lost, and that neither reconstruction nor new trial was possible.

Laurence T. Sorkin and Anthony Paduano, New York City, for appellant.

Howard R. Relin Dist. Atty. (Melvin Bressler, Rochester, of counsel), for respondent.

OPINION OF THE COURT

PER CURIAM.

Defendant was convicted of murder in the State of Mississippi and presently awaits execution of a death sentence, which has been temporarily stayed pending decision on his petition for postconviction relief. To advance his efforts to obtain such relief, defendant now seeks reversal of a 1963 New York assault conviction, which was used as an aggravating factor at the sentencing phase of the Mississippi trial.

We construe the Appellate Division order as one affirming the judgment of resentence and determining that review of the underlying 1963 conviction was not avail-

able, 50v .2d 789. This order is appealable to t.. court (CPL 450.90).

We agree that, as the defendant argues and the People concede, the passage of time does not bar appeal in the unusual circumstances of this case, which include the possible use of the conviction as an aggravating factor leading to a death sentence. It is undisputed that defendant was never advised of his right to appeal from the assault conviction and that, upon discovering that right, he made several timely and diligent *pro se* attempts to obtain review of the judgment through the avenues available to him at the time. Further, it is undisputed that the actions of this State prevented defendant from ever obtaining the review of the conviction to which he was entitled.

[1, 2] The appeal is not barred by CPL 450.30(3), which provides, in essence, that the time for taking an appeal from the original judgment is not revived by a resentencing that occurs more than 30 days after the original sentence was imposed. Nor is appeal barred by CPL 460.30, which limits the time for seeking an extension of the 30-day period for taking an appeal to one year from the date that the statutory 30-day period expired. Both of these statutes became effective after the period between 1967 and 1971, when defendant's timely efforts to appeal were being thwarted by the State (*see, People v. Montgomery*, 24 N.Y.2d 130, 299 N.Y.S.2d 156, 247 N.E.2d 130). In these special circumstances, the People, as they correctly concede, cannot rely upon a subsequently imposed time limitation to prevent a defendant from obtaining appellate review of his conviction (*People v. Thomas*, 47 N.Y.2d 37, 416 N.Y.S.2d 573, 389 N.E.2d 1094). *People v. Corso*, 40 N.Y.2d 578, 388 N.Y.S.2d 886, 357 N.E.2d 357, which held CPL 460.30 applicable to appeals from judgments of conviction entered prior to that statute's enactment, does not require a different conclusion, since that decision did not [illegible] a situation in which the defendant had made timely efforts to raise an appealable issue before the statute was adopted.

[3] Finally, the People concede that the records of defendant's trial have been lost, that neither reconstruction nor a new trial is possible and that defendant has raised appealable issues with possible merit. Thus, the only available remedy at this point is vacatur of the conviction and dismissal of the indictment (*see, People v. Rivera*, 39 N.Y.2d 519, 384 N.Y.S.2d 738, 349 N.E.2d 825).

Accordingly, the order of the Appellate Division should be reversed, the conviction vacated and the indictment dismissed.

WACHTLER, C.J., and SIMONS, KAYE, TITONE, HANCOCK and BELLACOSA, JJ., concur in PER CURIAM opinion.

ALEXANDER, J., taking no part.

Order reversed, etc.

Cite as 509 N.Y.S.2d (Sup. 1986)

28

2

the State of New
Giles WADE,
itioner,

v.

, as Superintendent
ctional Facility, et
pondents.

pellate Division, Third
9, 1986. Application,
7002(b)(2) for writ of
(see, *People ex rel.*
A.D.2d 667, 469 N.Y.

ood KANE,
H and LEVINE, JJ.,

of Donald E.
Petitioner,

, Respondent.

Proceeding.)
ellate Division, Third
1986. Motion to
d, without costs, on
orders involved are
5701[a][2]).

d KANE, WEISS,
NE, JJ., concur.

1

POWER AUTHORITY OF the STATE OF NEW YORK, Appellant,

v.

Robert CAPUTO et al., Respondents.

(And Two Other Related Actions.)

Supreme Court, Appellate Division, Third Department. Dec. 18, 1986. Robert P. Nydam, P.C., Oneonta, for appellant. CASEY, Justice. Appeals from that part of (1) two orders of the Supreme Court (Ingraham, J.), entered June 20, 1986 in Otsego County, and (2) an order of said court, entered June 18, 1986 in Delaware County, which, after granting plaintiff's motions for preliminary injunctions, imposed certain limitations on the activities authorized by the injunctions. The limitations imposed by Supreme Court must be deleted (*Power Auth. of State of N.Y. v. Potocnik*, App.Div., 508 N.Y.S.2d 665; *Power Auth. of State of N.Y. v. Bowen*, 121 A.D.2d 840, — N.Y.S.2d —). Orders modified, on the law and the facts, without costs, by deleting the third decretal paragraphs thereof containing three limitations, and, as so modified, affirmed.

MAHONEY, P.J., and KANE, WEISS and LEVINE, JJ., concur.

2

PEOPLE, Respondent,

v.

Samuel Bice JOHNSON, Appellant.

Supreme Court, Appellate Division, Fourth Department. Dec. 3, 1986. Motion for summary reversal denied. Memorandum: Relief pursuant to *People v. Montgomery*, 24 N.Y.2d 130, 299 N.Y.S.2d 156, 247 N.E.2d 130, is no longer available (*see People v. Corso*, 40 N.Y.2d 578, 388 N.Y.S.2d 886, 357 N.E.2d 357). Under CPL 450.30(3), defendant's appeal following resentencing does not bring up for review the judgment of conviction and, hence, it is immaterial that the transcript of the trial testimony is unavailable.

DILLON, P.J., and CALLAHAN, DOERR, DENMAN and BOOMER, JJ., concur.

3

Charles J. LAUDICO, Respondent-Appellant,

v.

SEARS, ROEBUCK AND COMPANY, Moore Company, Appellants-Respondents. Appeal No. 2.

Supreme Court, Appellate Division, Fourth Department. Dec. 19, 1986. Mark G. Farrell by Joseph Krenitsky, Buffalo, for appellants-respondents. Paul William Beltz, P.C by Elizabeth Ciamerone, Buffalo, for respondent-appellant. Order unanimously modified on the law and as modified affirmed without costs, in accordance with same Memorandum as in *Laudico v. Sears, Roebuck and Company, Appeal No. 1*, App.Div., — N.Y.S.2d —, decided herewith. (Appeal from Order of Supreme Court, Erie County, Joslin, J.—Protective Order.)

DOERR, J.P., and GREEN, BALIO, LAWTON and SCHNEPP, JJ., concur.

...Daily Record Corp.

PREME COURT OF THE S ATE OF NEW YORK
App...ate Division, Fourth Judicial Department

People of the State of New York, Respondent,

v

Samuel Bice Johnson, Appellant.

A motion having been made on behalf of the appellant for reconsideration and renewal of the motion for summary reversal denied by order of this Court entered December 3, 1986

Now, upon reading and filing the statement of Laurence Sorkin dated December 8, 1986, the notice of said motion with proof of service thereof, and due deliberation having been had thereon,

It is hereby ORDERED, That said motion be, and the same hereby is denied.

Entered:

December 12, 1986

CARMEN S. LEONE, *Clerk*

STATE OF NEW YORK
COUNTY COURT COUNTY OF MONROE

THE PEOPLE OF THE STATE OF NEW YORK

-vs- Ind. No. 32/63

SAMUEL BICE JOHNSON

APPEARANCES: HOWARD R. RELIN
District Attorney of Monroe County
MELVIN BRESSLER
Assistant District Attorney
Of Counsel

CAHILL, GORDON, & REINDEL
Attorney for the Defendant
LAWRENCE SORKIN &
ANTHONY PADUANO
Of Counsel

DECISION AND ORDER

Connell, J.

The Defendant-Petitioner has made an application pursuant to CPL Section 440.10 to vacate his judgement of conviction entered on March 12, 1963 on the grounds that his state and federal rights were violated in that (1) he was never informe of his right to appeal; (2) that a confession that was alleged introduced at his trial was involuntarily made; and (3) that the alleged statement was made subsequent to his indictment but without the presence of counsel. This case is extremely unusual in many respects, both from the standpoint of the factual and legal issues raised but also from the fact that the defendant is presently on death row in the State of Mississippi following a conviction for murder of a Mississipp Highway Trooper. Apparently under the Mississippi death penalty statute, a defendant may not be sentenced to death

unless a jury determines there to be at least one aggravating circumstance which outweighs anything offered by the defendant in mitigation. In the defendant's case, the alleged aggravating circumstance is this 1963 conviction in New York for Assault in the Second Degree, which apparently qualified under the Mississippi statute as a prior violent felony conviction. The defendant here seeks to vacate this 1963 conviction as a prelude to seeking a new sentencing hearing in the State of Mississippi.

It would appear from the papers submitted by the defendant and the response papers of the People that the defendant and his co-defendant were arrested on February 11, 1963 concerning an alleged assault that took place on a woman in the City of Rochester on February 9, 1963. According to an affidavit of the attorney representing the defendant at that time, he first met his client just prior to his arraignment on February 26, 1963; was ordered to start trial on March 8, 1963; started trial on March 10, 1963; the verdict convicting the defendant of Assault in the Second Degree was returned March 12, 1963; and the defendant was sentenced on April 9, 1963 to a term of state incarceration. An affidavit by the Assistant Deputy County Clerk for Monroe County indicates that the Clerk's Office is unable to locate the trial transcripts, any hearing transcripts, any minutes by the clerk, jury instructions, physical evidence, or statements or confessions made by the defendant. An affidavit by the Chief Court Reporter for Monroe County indicates an inability to find the stenographic tapes or trial transcript of this case. The People concede the fact that the defendant was not properly informed of his right to appeal in 1963. By so conceding the People request that the Court remedy that error by vacating the sentance and order that the defendant be resentanced so that he can now begin his appeal process. The defendant requests that the conviction be vacated on the

theory that it was constitutionally invalid. Acknowledging that the defendant's case predated People v. Huntley, 15 NY2d 72, the defendant contends that the only proper forum for the issue as to the voluntariness of the defendant's statement is by way of coram nobis. The defendant urges that the Court make a determination based on the papers submitted that the defendant's rights were violated under the Huntley line of cases, or in the alternative, to hold a hearing on this issue.

I do not feel the papers as submitted sufficiently set forth facts which would require the Court, as a matter of law, to make such a determination.

The practical problems of both the defendant's and the People's suggested solutions in this case involve large hurdles to overcome. Acknowledged by all is the fact that resentencing would have to happen in Monroe County. All parties have doubts as to whether or not the Mississippi authorities would be willing to relinquish the custody of the defendant to the state authorities in New York for purposes of a resentencing since he is presently on death row. Also a review of Article 570 of the Criminal Procedure Law involving the law of extradition along with the knowledge of the sometimes lengthy process in implementing extradition proceedings make this solution unacceptable. It must be kept in mind that in this case "time is of the essence". It appears as if the Mississippi Supreme Court which has stayed the execution of the defendant pending the outcome of this application, has directed the parties to submit papers by November 6, 1986.

The People also urge that the defendant waive his right to be present at his resentencing. CPL Section 380.40(1) states that "the defendant must be personally present at the time sentance is pronounced." Is that right a waivable right?

The defendant in his papers and oral argument raised several persuasive arguments as to why he should not waive his rights to be present at any resentencing. The potential of creating another knot in this boondoggle of procedure in which all the parties find themselves also supports the defendant's position on that point.

However, the request of the defendant for a hearing presents the same problems as to how the defendant should or could waive his presence at such a hearing. Reasonable attempts to locate witnesses who could testify at a reconstruction hearing could also result in a "fatal" passage of time.

CPL Section 450.30(3) defines an appeal from a sentence as "an appeal from either the sentance originally imposed or from a resentence following an order vacating the original sentence."

CPL Section 440.10(2)(b) requires denial of the motion where the "judgement is, at the time of the motion, appealable . . ., and sufficient facts appear on the record with respect to the ground or issue raised upon the motion to permit adequate review thereof upon such an appeal, . . ."

There is no decision of the issues presented that will satisfactorily solve all the practical problems of this matter. However, this Court cannot and will not attempt to force jurisdiction on the Appellate Division by merely granting leave to the defendant to appeal the 1963 sentance and judgement. Nor can this Court decide the issues presented under coram nobis since, as the People concede, the defendant does fall within Section 440.10(2)(b).

Accordingly, the defendant's motion is denied in all respects and this Court will order the defandant resentance to afford him his right to appeal pursuant to CPL Section 450.30(3). This Court will also entertain an application, by both parties in view of the particular facts of this case, to allow the defandant to waive his rights under CPL Section 380.40 to be present at such resentancing.

Resentencing is scheduled for November 12, 1986.

Signed this 29th day of October, 1986 at Rochester, New York.

John J. Connell

JOHN J. CONNELL
County Court Judge

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

ORIGINAL

Supreme Court U.S.
FILED
NOV 16 1987
JOSEPH F. SPANIOL JR.
CLERK

87-5468
NO. ~~85-6385~~

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

SAMUEL B. JOHNSON,

Petitioner,

VERSUS

STATE OF MISSISSIPPI,

Respondent.

==========

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF MISSISSIPPI

==========

BRIEF IN OPPOSITION

==========

EDWIN LLOYD PITTMAN
ATTORNEY GENERAL
STATE OF MISSISSIPPI

MARVIN L. WHITE, JR.
ASSISTANT ATTORNEY GENERAL
Counsel of Record

Attorneys for Respondent

Office of the Attorney General
Post Office Box 220
Jackson, Mississippi 39205
Telephone: (601) 359-3680

QUESTIONS PRESENTED

1. Under The Mississippi Death Sentencing Scheme The Interpretation Of Aggravating Circumstances Is A Matter Of State Law As The Constitutionally Required Narrowing Is Accomplished In The Definition Of the Crimes Which Are Eligible For The Death Penalty. Further Where Three Aggravating Circumstances Supporting the Sentence Of Death Are Found To Exist Beyond A Reasonable Doubt By The Jury The Subsequent Invalidation Of One Of Those Factors Does Not Require The Vacation Of The Sentence Of Death, Therefore Certiorari Should Be Denied.

2. Where The Refusal To Vacate The Death Sentence Of Petitioner Does Not Rest On Whether Full Faith And Credit Is Given To The Judgment Of The New York Court Of Appeals There Is No Federal Question And Certiorari Should Be Denied.

3. The Interpretation Placed On The Aggravating Circumstance Of "Especially Heinous, Atrocious Or Cruel" Is A Matter Of State Law And Therefore Not Cognizable By This Court On Certiorari, Therefore Certiorari Should Be Denied.

TABLE OF CONTENTS

QUESTION PRESENTED---------- i

TABLE OF CONTENTS---------- ii

TABLE OF AUTHORITIES ---------- iii

OPINIONS BELOW---------- 1

JURISDICTION---------- 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED---------- 1

STATEMENT OF THE CASE---------- 2

REASONS FOR DENYING ---------- 4

ARGUMENT---------- 4

1. Under The Mississippi Death Sentencing Scheme The Interpretation Of Aggravating Circumstances Is A Matter Of State Law As The Constitutionally Required Narrowing Is Accomplished In The Definition Of the Crimes Which Are Eligible For The Death Penalty. Further Where Three Aggravating Circumstances Supporting the Sentence Of Death Are Found To Exist Beyond A Reasonable Doubt By The Jury The Subsequent Invalidation Of One Of Those Factors Does Not Require The Vacation Of The Sentence Of Death, Therefore Certiorari Should Be Denied---------- 4

2. Where The Refusal To Vacate The Death Sentence Of Petitioner Does Not Rest On Whether Full Faith And Credit Is Given To The Judgment Of The New York Court Of Appeals There Is No Federal Question And Certiorari Should Be Denied---------- 12

3. The Interpretation Placed On The Aggravating Circumstance Of "Especially Heinous, Atrocious Or Cruel" Is A Matter Of State Law And Therefore Not Cognizable By This Court On Certiorari, Therefore Certiorari Should Be Denied.---------- 13

CONCLUSION---------- 15

CERTIFICATE OF SERVICE---------- 17

TABLE OF AUTHORITIES

Cases	Page
Caldwell v. Mississippi, 472 U.S. 320, 86 L.Ed.2d 231, 105 S.Ct. 2633 (1985).....	10,14
Celestine v. Butler, 823 F.2d 74 (5th Cir. 1987), cert. denied, ___ U.S. ___, 108 S.Ct. 6 (1987).....	11
Evans v. Thigpen, 809 F.2d 239 (5th Cir. 1987), cert. denied, ___ U.S. ___, 107 S.Ct. 3278, 97 L.E.d 2d 782 (1987).....	11
Johnson v. State, 477 So.2d 196 (Miss. 1985), cert. denied, ___ U.S. ___, 106 S.Ct. 1958, reh. denied, ___ U.S. ___, 106 S.Ct. 2930 (1986).	2
Johnson v. State, 511 So.2d 1333 (Miss. 1987).....	1,6
Johnson v. Mississippi, ___ U.S. ___, 106 S.Ct. 1958 (1986).....	3
Johnson v. Mississippi, ___ U.S. ___, 106 S.Ct. 2930 (1986).....	3
Johnson v. Thigpen, 806 F.2d 1243 (5th Cir. 1986), cert. denied, ___ U.S. ___, 107 S.Ct. 1618, 94 L.Ed.2d 802 (1987), pet. reh. denied, ___ U.S. ___, 107 S.Ct. 2207, 95 L.Ed.2d 861 (1987).....	5,7 12,14
Knighton v. Maggio, 740 F.2d 1344,1351-52 (5th Cir. 1984), cert. denied, ___ U.S.___ 105 S.Ct. 306, 83 L.Ed.2d 241 (1984).....	11,13
Moore v. Maggio, 740 F.2d 308, 321 (5th Cir. 1984), cert. denied, 472 U.S. 1032, 105 S.Ct. 3524, 87 L.Ed.2d 643 (1985).....	11,13
People v. Johnson, 69 N.Y.2d 339, 506 N.E.2d 1177(N.Y. 1987).....	7
People v. Johnson, 509 N.Y.S.2d 789 (A.D. 4 Dept. 1986).....	7
Rault v. Butler, 826 F.2d 299 (5th Cir. 1987), cert. denied, ___ U.S. ___, 108 S.Ct. 14 (1987)..	11
Watson v. Blackburn, 756 F.2d 1055, 1058 (5th Cir. 1985), cert. denied, ___ U.S. ___, 106 S.Ct. 2259, 93 L.E.d 2d 703 (1986).....	11
Williams v. Maggio, 679 F.2d 381, 388-90 (5th Cir. 1982)(en banc), aff'd, 464 U.s. 46, 104 S.Ct. 311, 78 L.Ed.2d 43 (1983).....	11
Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983).....	11,13

Constitutional and Statutory Provisions

Article IV, United States Constitution.....	1
Amendment VIII, United States Constitution.....	1
Amendment XIV, United States Constitution.....	1
28 U.S.C. § 1257 (3) (1982).....	1
28 U.S.C. § 1738 (1982).....	1
Miss. Code Ann., Section 97-3-19 (2)(a) (Supp. 1984).....	2,7
Miss. Code Ann., Section 99-19-101 et seq. (Supp. 1984).....	1,2
Miss. Code Ann., Section 99-39-21 (Supp. 1984).....	9

NO. 85-6325

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

SAMUEL B. JOHNSON,
Petitioner,

VERSUS

STATE OF MISSISSIPPI,
Respondent.

==========

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

==========

BRIEF IN OPPOSITION

==========

Respondent, State of Mississippi, respectfully prays that the Petition for Writ of Certiorari to the Supreme Court of the State of Mississippi be denied in this case.

OPINION BELOW

The opinion of the Supreme Court of the State of Mississippi is reported as Johnson v. State, 511 So.2d 1333 (Miss. 1987). A copy of the opinion is before the Court as an Exhibit to petitioner's Petition for Writ of Certiorari to the Supreme Court of Mississippi.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court by way of a Petition for Writ of Certiorari through the authority of 28 U.S.C. § 1257 (3). He fails to do so.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner claims that the provisions of the Constitution of the United States, Article IV, section 1; Amendments VIII, and XIV are involved in this petition. He also claims that 28 U.S.C. § 1738 (1982), as well as Miss. Code Ann. §99-19-101 (Supp. 1986) are involved.

STATEMENT OF THE CASE

Petitioner appears before this Court as a result of the denial of post-conviction relief by the Mississippi Supreme Court. The conviction and resulting death sentence he is challenging were returned in the Circuit Court of Pike County, Mississippi. The Pike County trial was conducted pursuant to an indictment returned by the grand jury of Covington County, Mississippi for the capital murder of Highway Patrolman Billy Langham in the course of his duty as a peace officer. Miss. Code Ann. § 97-3-19 (2) (a). Venue was changed to Pike County, Mississippi on motion of petitioner. Petitioner's bifurcated trial was conducted pursuant to Miss. Code Ann. § 99-19-101 et seq. At the conclusion of the sentencing phase of the trial the jury returned a sentencing verdict of death, finding three aggravating circumstances and holding that they outweighed any mitigating circumstances. These aggravating circumstances were:

> (1) That the defendant, Samuel Johnson, was previously convicted of a felony involving the use of threat of violence to the person.
>
> (2) That the defendant, Samuel Johnson, committed the capital murder for the purpose of avoiding arrest or effecting an escape from custody.
>
> (3) The capital murder was especially heinous, atrocious and cruel.
>
> Tr. 2294; 511 So.2d at 1337.

On automatic direct appeal to the court below petitioner raised twenty-two separate claims of error. After briefing and argument, on May 8, 1985 the Mississippi Supreme Court affirmed, by written opinion, petitioner's conviction and death sentence. A petition for rehearing was denied on November 6, 1985. Johnson v. State, 477 So.2d 196 (Miss. 1985). Petitioner then filed a petition for writ of certiorari with this Court. After consideration this

petition was denied. Johnson v. Mississippi, ___U.S. ___, 106 S.Ct. 1958 (1986). A petition for rehearing was filed and denied in due course. Johnson v. Mississippi, ___ U.S. ___, 106 S.Ct. 2930 (1986).

The facts giving rise to petitioner's conviction and sentence of death show that on December 31, 1981, petitioner, Samuel Johnson, Charles Montgomery, Otis Lee Fairley and Anthony Fields left New Orleans, Louisiana headed for Collins, Mississippi. They were traveling in Johnson's yellow Ford LTD automobile. They stopped briefly to visit some of Fairley's relatives in Purvis, Mississippi. When they were approaching Collins they were stopped by Mississippi Highway Patrolman Billy Langham. Langham asked Johnson to produce a driver's license. Johnson had none. Langham then asked Johnson to get out of the car. Johnson complied. When Johnson got out of the car Langham saw a butcher knife on the front seat next to the spot where Johnson had been sitting. He asked Johnson to move to the rear of the car. Langham then placed the butcher knife on top of his patrol car. He went back to the LTD and told the rest of the occupants of the car he was going to search them. He did so one-by-one sending them to stand near the patrol car as he finished searching each one. He then proceeded to search the LTD.

While he was searching the car Fairley walked to the patrol car, got the butcher knife and gave it to Johnson. Johnson slowly walked back to his car and stabbed Langham in the back as he was searching the back seat of the LTD.

Langham went for his gun. Johnson also went for Langham's gun. They struggled. Johnson called to Fairley for assistance when Langham proved to be to much for him to handle. Johnson and Fairley then struggled with Langham. Johnson then told Montgomery to get Langham's gun.

Montgomery joined the afray and got the gum. When Montgomery secured the gun he yelled to the others that he had the gun. Johnson and Fairley broke free of Langham and went for the car. Montgomery held the gun on Langham. Montgomery started to get in the car and Johnson said "No, shoot the motherfucker." Montgomery hesitated and Johnson told him again to shoot. Montgomery advanced on Langham as he begged him not to shoot. Montgomery shot and killed Langham. He then got in the car and threw the gun out as they sped away.

The four men abandoned the yellow LTD a short time later and obtained a yellow Mercury Comet. They were finally stopped by shooting out the tires of the car when they attempted to run through a police roadblock.

REASONS FOR DENYING THE WRIT

Petitioner has presented no Federal question that is cognizable by this Court therefore the petition for writ of certiorari should be denied.

ARGUMENT

1. **Under The Mississippi Death Sentencing Scheme The Interpretation Of Aggravating Circumstances Is A Matter Of State Law As The Constitutionally Required Narrowing Is Accomplished In The Definition Of the Crimes Which Are Eligible For The Death Penalty. Further Where Three Aggravating Circumstances Supporting the Sentence Of Death Are Found To Exist Beyond A Reasonable Doubt By The Jury The Subsequent Invalidation Of One Of Those Factors Does Not Require The Vacation Of The Sentence Of Death, Therefore Certiorari Should Be Denied.**

We begin by pointing out that Evans' claim under this question presented does not involve a federal question. The interpretation and application of aggravating circumstances under the Mississippi statutory scheme for imposition of the death penalty is a matter of state law not cognizable by the federal courts. In addressing a similar question concerning the application of aggravating circumstances under the

Mississippi capital sentencing scheme in Johnson v. Thigpen, 806 F.2d 1243 (5th Cir. 1986), cert. denied, ___ U.S. ___, 107 S.Ct. 1618, 94 L.Ed.2d 802 (1987), pet. reh. denied, ___ U.S. ___, 107 S.Ct. 2207, 95 L.Ed.2d 861 (1987), the Fifth Circuit held:

> No such failure exists in the present case. Even given Mississippi's broadened construction of the especially heinous aggravating circumstance, and ignoring the other aggravating circumstance found by the jury,[3] the Mississippi capital murder statute still narrows the class of persons eligible for the death penalty. In the present case, for example, Johnson was convicted of the murder of a peace officer acting in his official capacity. This element of a capital offense in Mississippi is a statutory aggravating circumstance in Georgia. Ga. Code §27-2534.1(b)(8), quoted in Godfrey, 446 U.S. at 423 n. 2, 100 S.Ct. at 1762 n.2. The definition of capital murder in Mississippi serves the same narrowing function as the parallel aggravating circumstance would in Georgia.
>
> In fact, the Mississippi death penalty statute, as applied in this case, is indistinguishable from the Texas statute. In approving the Texas statute in Jurek, the Supreme Court recognized that, by defining capital murder narrowly, "in essence, the Texas statute requires that the jury find the existence of a statutory aggravating circumstance before the death penalty may be imposed." 428 U.S. at 270, 96 S.Ct. at 2955. As this court stated in Welcome v. Blackburn, 793 F.2d 672, 677 (5th Cir. 1986)
>
> > By classifying first degree murder as including certain aggravating circumstances the state has narrowed the class of those subject to the death penalty as effectively as if it allowed a broader class to be convicted but then limited those within the broader class who could be sentenced to death to only persons whose crimes are accompanied by specific aggravating circumstances.

The Mississippi statute, unlike the Texas statute, provides the added protection of requiring proportionality review by the state supreme court. Compare Miss. Code Ann. § 99-19-105(3)(c) (Supp. 1985) with Pulley v. Harris, 465 U.S. 37, 104 S.Ct. 871, 878, 79 L.Ed.2d29 (1984). See Barclay v. Florida, 463 U.S. 939, 958, 103 S.Ct. 3418, 3429, 77 L.Ed.2d 1134 (1983) (plurality opinion); Stephens, 462 U.S. at 879-80, 103 S.Ct. at 2743. Thus, the Mississippi death penalty statute satisfies constitutional requirement despite the broad construction placed on the especially heinous aggravating circumstance by the Mississippi Supreme Court.[4]

> We do not base this decision on the harmless error doctrine of Stephens, 462 U.s. at 884-91, 103 S.Ct. at 2746-50. See Barclay, 463 U.S. at 951 n.8, 103 S.Ct. at 3425 n. 8. Mississippi's choice to apply a broadened construction to the especially heinous aggravating circumstance is not constitutional error. If the change in construction is an error at all, it is an error of state law that is not cognizable on habeas review. Harris, 104 S.Ct. at 875; Barclay, 463 U.S. at 957-58, 103 S.Ct. at 3428-29. [Footnotes omitted.]
>
> 806 F.2d at 1248-49.

As the Fifth Circuit recognized in Johnson v. Thigpen, Mississippi has adopted a scheme for imposition of the death penalty that has a somewhat unique double narrowing feature. Because of the narrow definition of capital murder in Mississippi the statutory aggravating circumstances in the Mississippi scheme do not take on the same constitutional significance they would in other schemes, such as Georgia's, where everyone convicted of first degree murder is eligible for the death penalty upon the finding of an aggravating circumstance. Under the Mississippi scheme unless the crime fits under one of the narrow definitions of capital murder found in Section 97-3-19 (2), Miss. Code Ann. (Supp. 1986), one cannot even be charged with capital murder. There being no federal question presented here, certiorari should be denied. However, out of an abundance of caution, we will briefly speak to the challenge to the aggravating circumstance found in this case.

When the jury in petitioner's case returned the sentence of death in 1982 they found the existence of three aggravating circumstances to support that sentence. These aggravating circumstances, as set forth in the sentence of the jury, were:

> (1) That the defendant, Samuel Johnson, was previously convicted of a felony involving the use of threat of violence to the person.

> (2) That the defendant, Samuel Johnson, committed the capital murder for the purpose of avoiding arrest or effecting an escape from custody.
>
> (3) The capital murder was especially heinous, atrocious and cruel.
>
> Tr. 2294; 511 So.2d at 1337.

The basis for finding the first aggravating factor was a 1963 conviction from the State of New York for assault second degree with intent to commit rape, first degree. Petitioner made two challenges to this finding by the jury on direct appeal, first, that it did not channel the jury's discretion by "clear and objective standards," and second, the conviction was too remote in time. Both arguments were rejected by the Mississippi Supreme Court. 477 So.2d at 218-219; 511 So.2d at 1336. Only after affirmance of the conviction and sentence by the Mississippi Supreme Court and denial of certiorari by this Court was any question raised in any court concerning the validity of the 1963 New York conviction.

Petitioner filed the challenge to the 1963 New York assault conviction at approximately the same time his post-conviction petition was filed against the Mississippi capital conviction and sentence in 1986. Initially the Monroe County Court and the Supreme Court of New York denied relief to petitioner. People v. Johnson, 509 N.Y.S.2d 789 (A.D. 4 Dept. 1986). However, on appeal from this denial of relief the New York Court of Appeals granted the relief requested. People v. Johnson, 69 N.Y.2d 339, 506 N.E.2d 1177 (N.Y. 1987). This decision was forwarded, by petitioner, to the Mississippi Supreme Court for its consideration in connection with the pending Mississippi post-conviction petition.

The court below first discussed the limited nature of post-conviction review in Mississippi both under the post-conviction review statute and prior court precedent.

511 So.2d at 1336. Then Mississippi Supreme Court spoke to the issue of the first aggravating circumstance on three alternative grounds stating:

> It is apparent that Johnson waived this claim, and it is procedurally barred. At no time during his direct appeal, or in his petition for certiorari to the United States Supreme Court did he argue his New York conviction was constitutionally invalid. Moreover, there is nothing to suggest he took any steps to vacate this conviction until he filed this petition. On appeal Johnson's counsel alleged thirteen assignments of error, and at Johnson's own urging, his counsel added seven additional assignments. None questioned the validity of his New York conviction. See Evans v. State, 485 So.2d 276 (Miss. 1986), at 280-281.
>
> Also, the jury found three aggravating circumstances to support its verdict. Even if we conceded that the jury had no authority to consider this conviction, the remaining two aggravating circumstances were sufficient to support the jury's verdict. Zant v. Stephens, 462 U.S. 862, 880-884, 103 S.Ct. 2733, 2744-2746, 77 L.Ed.2d 235, 252-254 (1983); Irving v. State, 498 So.2d 305, 314 (Miss. 1986).
>
> Aside from the statutory limitation of review, we remain unpersuaded by this contention.
>
> We have never faced this question. A somewhat similar question has been before un concerning the use of a prior criminal conviction to impeach a defendant in a criminal trial. We have held that subsequent reversal on appeal of a prior conviction did not affect a defendant's trial conviction. Young v. State 425 So.2d 1022 (Miss. 1983); Milstid v. State, 347 So.2d 1319 (Miss. 1977); and Nicholson v. State, 254 So.2d 881 (Miss. 1971).
>
> Also, in Phillips v. State, 421 So.2d 476 (Miss. 1982), the state used a Kentucky conviction as a basis for Phillips' conviction under one of Mississippi's habitual criminal statutes. Miss. Code. Ann. § 99-19-81 (Supp. 1984). We held that when the conviction was subsequently reversed, it could constitute a basis for post-conviction relief from the habitual criminal conviction.
>
> Under Miss. Code Ann. § 99-19-81, however, upon proof of the prior conviction a circuit judge has no alternative except to sentence to the maximum authorized by law. Such a sentence cannot be suspended and the accused will never be eligible for parole or probation prior to serving this maximum sentence. In the sentencing phase of a capital murder trial the jury is not required to sentence the defendant to death, regardless of its finding.

> When a prior conviction is used under either habitual offender statute, it is, of course, certain that the defendant will receive greater punishment. The admission of a prior conviction in order to impeach the accused as a witness, or at a sentencing phase of a capital murder trial may or may not materially influence the jury.
>
> As we noted, the jury found three aggravating circumstances existed, and of the three we have little doubt that in a rational sentencing process Zant v. Stephens, supra, the other two aggravating circumstances would carry greater weight than the New York conviction in determining Johnson's sentence. Indeed, the remoteness in time at the time of the prior conviction was a mitigating circumstance. Johnson v. State, 477 So.2d at 219.

[emphasis added.] 511 So.2d 1337-38.

The above language makes it clear that the Mississippi Supreme Court first invoked the state procedural bar in deciding that the issue of the validity of the 1963 conviction was not properly before it. As stated earlier, post-conviction review is limited in Mississippi. The provisions of the post-conviction review statute were invoked by the court when it quoted the provisions of Section 99-39-21, Miss. Code Ann. (Supp. 1984), reads in part:

> (1) Failure by a prisoner to raise objections, defenses, claims, questions, issues or errors either in fact or law which were capable of determination at trial and/or on direct appeal, regardless of whether such are based on the laws and the Constitution of the state of Mississippi or of the United States, shall constitute waiver thereof and shall be procedurally barred, but the court may upon a showing of cause and actual prejudice grant relief from the waiver.
>
> . . .
>
> (4) The term "cause" as used in this section shall be defined and limited to those cases where the legal foundation upon which the claim for relief is based could not have been discovered with reasonable diligence at the time of trial or direct appeal.
>
> (5) The term "actual prejudice" as used in this section shall be defined and limited to those errors which would have actually adversely affected the ultimate outcome of the conviction or sentence.

[Emphasis the Court's.] 511 So.2d at 1336.

Petitioner did not raise a claim on the basis of the invalidity of the New York conviction at trial or on direct appeal therefore he was procedurally barred from raising such a claim on state post-conviction review unless he could show cause and actual prejudice. Petitioner did not, and we submit could not, show the required "cause" under state law because the legal foundation upon which the claim for relief was based could have been discovered with reasonable diligence at the time of trial or direct appeal. The New York conviction was at least twenty years old at the time of the trial. The legal theory upon which the New York conviction was reversed was available to petitioner at all times during those twenty years. Therefore the claim was properly procedurally barred as petitioner could not show cause. Nor could petitioner overcome the hurdle of actual prejudice. The Mississippi Supreme Court found that even if the issue had not been procedurally barred, the the jury found two other aggravating circumstances that "would carry greater weight than the New York conviction in determining Johnson's sentence." 511 So.2d at 1338. Therefore under state procedural law petitioner was barred from raising this claim and therefore is so barred here. In Caldwell v. Mississippi, 472 U.S. 320, 86 L.Ed.2d 231, 105 S.Ct. 2633 (1985), this Court stated "[i]f the state court decision indicates clearly and expressly that it is alternatively based on a bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision." 472 U.S. at 327. The Mississippi Supreme Court clearly and expressly stated that the issue was first procedurally barred from review, then it made alternative rulings. Therefore even if this proposition was cognizable by the federal courts it would be barred for failure to follow proper state procedural rules.

The second alternative ruling was made under the rational of Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), holding that the subsequent invalidation of one aggravating circumstance, when others exist, does not require the vacation of a death sentence. The court below considered the vacation of the New York conviction and found that the invalidity of the aggravating circumstance based upon the conviction was not sufficient to require the vacation of the death sentence. This is settled law. Rault v. Butler, 826 F.2d 299 (5th Cir. 1987), cert. denied, ____ U.S. ____, 108 S.Ct. 14 (1987); Celestine v. Butler, 823 F.21d 74 (5th Cir. 1987), cert. denied, ____ U.S. ___, 108 S.Ct. 6 (1987); Evans v. Thigpen, 809 F.2d 239 (5th Cir. 1987), cert. denied, ___ U.S. ___, 107 S.Ct. 3278, 97 L.E.d 2d 782 (1987); Watson v. Blackburn, 756 F.2d 1055, 1058 (5th Cir. 1985), cert. denied, ___ U.S. ___, 106 S.Ct. 2259, 93 L.E.d 2d 703 (1986); Knighton v. Maggio, 740 F.2d 1344,1351-52 (5th Cir. 1984), cert. denied, ___ U.S.___, 105 S.Ct. 306, 83 L.Ed.2d 241 (1984); Moore v. Maggio, 740 F.2d 308, 321 (5th Cir. 1984), cert. denied, 472 U.S. 1032, 105 S.Ct. 3524, 87 L.Ed.2d 643 (1985); Williams v. Maggio, 679 F.2d 381, 388-90 (5th Cir. 1982)(en banc), aff'd, 464 U.s. 46, 104 S.Ct. 311, 78 L.Ed.2d 43 (1983). Again if this issue were proper for federal review it would be without merit.

Finally the Mississippi Supreme Court considered tne question of whether the vacation of a conviction by a foreign state in a subsequent post-conviction proceeding actually invalidated the aggravating circumstance in Mississippi. The court held that in that situation the vacation of the conviction would not necessarily invalidate the aggravating circumstance in Mississippi. The interpretation of aggravating circumstances is purely a

matter of state law and therefore no constitutional violation is present here. Johnson, supra.

Even if the issue were cognizable by this Court, it is clear that the Mississippi court's decision rested first a state procedural bar and second on the ground that the failure of one of several aggravating factors did not vitiate the sentence. Since the court below expressly decided the issue on a alternate separate and independent state law grounds, even if this Court had jurisdiction to entertain the question it would fail. Since the interpretation of aggravating circumstances under the Mississippi death sentencing scheme is a matter of state law certiorari should be denied.

2. Where The Refusal To Vacate The Death Sentence Of Petitioner Does Not Rest On Whether Full Faith And Credit Is Given To The Judgment Of The New York Court Of Appeals There Is No Federal Question And Certiorari Should Be Denied.

Petitioner next contends that the Mississippi Supreme Court has failed to give the judgment of the New York Court of Appeals vacating his 1963 conviction for assault with intent to rape full faith and credit. The State of New York has filed an amicus in support of this position. Our response is simply that the court below in no way failed to give the judgment of the New York court full faith and credit. The Mississippi Court stated:

> The New York courts are, of course, the final and proper arbiters of all judicial proceedings in that state, including the disposition of post-conviction petitions. Assuredly, by our view, we suggest no impropriety in the courts of that state taking whatever action they deem appropriate in a criminal case in New York.

511 So.2d at 1339.

The court below did not in any way state that they were not recognizing that the conviction had been vacated. The Mississippi court simply stated that under the circumstances

of this case the vacation of the 1963 conviction by the New York Court of Appeals would not require the vacation of the death penalty verdict returned in Mississippi. Simply stated it did not matter that this New York conviction was vacated, two additional aggravating circumstances were present and all that is required to sustain a death penalty is one valid aggravating circumstance. Zant v. Stephens, supra, Knighton v. Maggio, supra, Moore v. Maggio, supra.

For the purposes of this argument it matters not whether the Mississippi Supreme Court extended full faith and credit to the judgment of the New York court. Even if the Mississippi Supreme Court had stated in the opinion that they disagreeded with the vacation of the 1963 conviction, which they did not, it would not have changed the outcome of the decision of the court below. The Mississippi court recognized that the conviction had been vacated but, held that it was not sufficient to change the outcome of the trial in which petitioner was sentenced to death. This is not a refusal to grant full faith and credit to the New York judgment, it is only an interpretation of the effect of such a reversal on a death sentence in Mississippi. Since no federal right has been violated certiorari should be denied.

3. The Interpretation Placed On The Aggravating Circumstance Of "Especially Heinous, Atrocious Or Cruel" Is A Matter Of State Law And Therefore Not Cognizable By This Court On Certiorari, Therefore Certiorari Should Be Denied.

This issue is not properly before this Court. The Court below held that this issue involving the "espically heinous, atrocious or cruel" aggravating circumstance was res judicata as it had been raised and decided on direct appeal and could not be raised again in a post-conviction petition. 511 So.2d at 1342. Therefore the state court

expressly imposed a procedural bar to the consideration of this issue below. An adequate and independant state law ground exist upon which this issue has been decided in this context. Caldwell, supra. The time and place for petitioner to present this issue to this Court would have been in his petition for writ of certiorari from the direct appeal filed in 1985 not from denial of this post-conviction petition. This is not a case of having different counsel at the two proceedings. One of the attorney's presently representing petitioner was representing him when the petition for certiorari was filed from the direct appeal. The choice was made at that time not to raise this issue before this Court. It cannot be done now, some twenty months after the time for filing a petition for certiorari from the direct appeal has passed. It seems we have petitioner attempting relitigate an issue that was properly a issue in the certiorari from direct appeal, but not from this post-conviction petition. On this ground alone certiorari should be denied.

Otherwise the issue is controlled by the decision of the Fifth Circuit in Johnson v. Thigpen, supra. Petitioner knows of the decision in Johnson, as he cites to it in footnote 15 of his petition. However he strangely states that "the Fifth Circuit held that the 'especially heinous, atrocious or cruel' aggravating circumstance was unconstitutionally vague as applied in Mississippi". Petition at 26. Suffice it to say that petitioner had better read Johnson v. Thigpen again, for his interpretation is severely flawed or he is deliberately attempting to mislead this Court. As stated above in response to the first question, the Fifth Circuit held that the interpretation placed on aggravating circumstance by the Mississippi Supreme Court was a matter of state law as the narrowing required by the constitution is performed by the

definition of capital murder in Mississippi. 806 F.2d at 1247-49. In fact the Fifth Circuit stated "Mississippi's choice to apply a broadened construction to the especially heinous aggravating circumstance is not constitutional error." 806 F.2d at 1249.

Even if this court somehow be found error in this aggravating circumstance, petitioner still has the problem of the existence of a third aggravating factor. The jury also found beyond a reasonable doubt that the petitioner "committed the capital murder for the purpose of avoiding arrest or effecting an escape from custody." R. 2263-64. That leaves a valid aggravating circumstance upon which the death penalty can rest. Therefore petitioner gets no relief from the sentence of death.

The evidence shows that petitioner set in motion the events that ended in Patrolman Billy Langhams death by taking a butcher knife and stabbing the officer in the back. A struggle insued during which the officers gun was taken from him. These tragic events concluded with petitioner ordering one of his cohorts to shoot the officer with his service revolver as the Langham begged for his life. These facts clearly show that the crime was especially heinous, atrocious or cruel.

The interpretation of this aggravating circumstance being a matter of state law, certiorari should be denied.

CONCLUSION

For the above and foregoing reasons respondent respectfully submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

EDWIN LLOYD PITTMAN, ATTORNEY GENERAL
STATE OF MISSISSIPPI

MARVIN L. WHITE, JR.
ASSISTANT ATTORNEY GENERAL
COUNSEL OF RECORD

BY: Marvin L. White, Jr.
MARVIN L. WHITE, JR.

Office of the Attorney General
Post Office Box 220
Jackson, Mississippi 39205
Telephone: (601) 359-3680

CERTIFICATE OF SERVICE

I, Marvin L. White, Jr., a Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed, via United States Postal Service, first-class postage prepaid, a true and correct copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the following:

Clive A. Stafford Smith
Southern Prisoners' Defense Committee
185 Walton Street, N.W.
Atlanta, Georgia 30303

and

Laurence T. Sorkin
Anthony Paduano
Cahill Gordon & Reindel
80 Pine Street
New York, New York 10005

This, the 16th day of November, 1987.

Marvin L. White, Jr.
MARVIN L. WHITE, JR.

ORIGINAL

No. 87-5468

Supreme Court, U.S.
FILED
NOV 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

RECEIVED
HAND DELIVERED
NOV 23 1987
OFFICE OF THE CLERK
SUPREME COURT, U.S.

SAMUEL BICE JOHNSON,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF MISSISSIPPI

REPLY TO OPPOSITION TO PETITION FOR CERTIORARI

Clive A. Stafford Smith
SOUTHERN PRISONERS' DEFENSE
COMMITTEE
185 Walton Street, N.W.
Atlanta, Georgia 30303
(404) 688-1202

Laurence T. Sorkin*
Anthony Paduano
CAHILL GORDON & REINDEL
(a partnership including
professional corporations)
80 Pine Street
New York, New York 10005
(212) 701-3000

Attorneys for Petitioner
Samuel Bice Johnson

*Counsel of Record

November 23, 1987

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	1
CONCLUSION	10

TABLE OF AUTHORITIES

Cases	Page
Barton v. Lockhart, 762 F.2d 712 (8th Cir. 1985)	4
Cartwright v. Maynard, 822 F.2d 1477 (10th Cir. 1987), petition for cert. filed, 56 U.S.L.W. 3290 (U.S. Sept. 21, 1987) (No. 87-519)	1, 2, 8
Commonwealth of Pennsylvania v. Nelson, 523 A.2d 728 (Pa. 1987), cert. denied, 56 U.S.L.W. 3320 (U.S. Nov. 2, 1987)	8, 9
Godfrey v. Georgia, 446 U.S. 420 (1980)	8, 9
Hawthorn v. Lovorn, 457 U.S. 255 (1982)	8n
Johnson (Edward Earl) v. Thigpen, 806 F.2d 1243 (5th Cir. 1986), cert. denied, 107 S. Ct. 1618 (1987)	4n, 8
Johnson v. State, 511 So. 2d 1333 (Miss. 1987)	7n
Phillips v. State, 421 So. 2d 476 (Miss. 1982)	5
Proffitt v. Florida, 428 U.S. 242 (1976)	2, 8
Reece v. Georgia, 350 U.S. 85 (1955)	8n
Townsend v. Burke, 334 U.S. 736 (1948)	2, 4, 8
United States v. Lemon, 723 F.2d 922 (D.C. Cir. 1983)	4
United States v. Malcolm, 432 F.2d 809 (2d Cir. 1970)	4
United States v. Messer, 785 F.2d 832 (9th Cir. 1986)	4
United States v. Robin, 545 F.2d 775 (2d Cir. 1976)	4
United States v. Stein, 544 F.2d 96 (2d Cir. 1976)	4
United States v. Tobias, 662 F.2d 381 (5th Cir. 1981), cert. denied, 457 U.S. 1108 (1982)	4
United States v. Tucker, 404 U.S. 443 (1972)	2, 4, 8
Wheat v. Thigpen, 793 F.2d 621 (5th Cir. 1986), cert. denied, 107 S. Ct. 1566 (1987)	6
Zant v. Stephens, 462 U.S. 862 (1983)	2, 3, 4

Constitutional Provision

U.S. Const. art. IV, § 1	7-8

Statute

Miss. Code Ann.

§ 99-39-21(1) (Supp. 1986)..... 5

No. 87-5468

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

SAMUEL BICE JOHNSON,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

REPLY TO OPPOSITION TO PETITION FOR CERTIORARI

In opposing certiorari Mississippi does not argue that the decision below was correct; it argues instead that neither a death sentence based on a subsequently invalidated prior conviction nor the refusal of the Mississippi Supreme Court to recognize the decision of the New York Court of Appeals vacating that conviction raises a federal question. We believe that these issues -- and the other issues raised by this case -- are important and warrant review by this Court. A death sentence based on a subsequently invalidated prior conviction violates the Eighth and Fourteenth Amendments and is not a matter of state law only.

1. This Court has before it a petition for a writ of certiorari to review the decision in Cartwright v. Maynard, 822 F.2d 1477 (10th Cir. 1987), petition for cert. filed, 56 U.S.L.W. 3290 (U.S. Sept. 21, 1987) (No. 87-519), where the

Tenth Circuit, sitting en banc, held unanimously that under Zant v. Stephens, 462 U.S. 862 (1983), a death sentence must be vacated if one aggravating circumstance is invalidated and that invalid circumstance was weighed by the jury at sentencing.

The Mississippi capital sentencing statute is in all material respects the same as the Oklahoma statute construed in Cartwright. The facts in Cartwright are less egregious than those here, since the aggravating circumstance found by the jury in Johnson's case rests upon impermissible evidence of an unconstitutional prior conviction that could not have been considered for enhancement purposes even in a non-death case. See United States v. Tucker, 404 U.S. 443, 444-45 (1972); Townsend v. Burke, 334 U.S. 736, 740-41 (1948). Contrary to Mississippi's argument (Brief in Opp. 4, 11-12), reliance on an unconstitutional prior conviction at sentencing violates due process.

Johnson's attack upon the validity of the "especially heinous, atrocious or cruel" aggravating circumstance is also more compelling on the facts than the attack on that same aggravating circumstance in Cartwright, since the jury that sentenced Johnson did not receive any instruction about what this aggravating circumstance is supposed to mean, while the jury in Cartwright received the Oklahoma Uniform Jury Instruction taken from Proffitt v. Florida, 428 U.S. 242, 255-56 (1976).

2. While it acknowledges that the New York conviction was subsequently vacated and there was thus no evidence to support the "prior violent felony conviction" aggravating circumstances found by the jury, Mississippi argues that the

reliance on an invalid aggravating circumstance at sentencing does not require reversal because no federal question is presented (Brief in Opp. 5) and because the "interpretation of aggravating circumstances is purely a matter of state law" (Brief in Opp. 11-12). Mississippi's argument ignores this Court's plain statement in Zant v. Stephens, supra, 462 U.S. at 885, that some kinds of evidence are so inherently prejudicial that reliance on that evidence to impose a death sentence requires automatic reversal, whether or not other valid aggravating circumstances are present:

> "Nor has Georgia attached the 'aggravating' label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as for example the race, religion, or political affiliation of the defendant, . . . or to conduct that actually should militate in favor of a lesser penalty, such as perhaps the defendant's mental illness . . . . If the aggravating circumstance at issue in this case had been invalid for reasons such as these, due process of law would require that the jury's decision to impose death be set aside." (Emphasis supplied)

In this case, as the transcript shows and Mississippi does not dispute, the prosecution made more than 22 separate references to Johnson's 1963 New York conviction at sentencing. (Pet. 7; R. 2271-79; 2282-87). No evidence with respect to any other aggravating circumstance was introduced at sentencing, and the prosecutor barely mentioned the other two circumstances in his argument to the jury. The jury was told that Johnson had a propensity for violence that was proved by his prior conviction for what was repeatedly called "second degree assault with intent to commit first degree rape" -- a crime that has never existed in New York despite what Mississippi continues to say (contrast Pet. 7-8 with Brief in Opp. 7, 12).

None of the cases that Mississippi cites (Brief in Opp. 11) supports its reading of Zant -- a reading that would permit the prosecution to rely at sentencing on evidence that is constitutionally inadmissible and "totally irrelevant to the sentencing process," Zant, 462 U.S. at 885, so long as it could establish one valid aggravating circumstance. No case cited by Mississippi involved the introduction of constitutionally inadmissible evidence to establish an invalid aggravating circumstance.[1] The rule is the other way. Tucker and Townsend establish that where, as here, the sentencer relies on an invalid prior conviction or other "misinformation" of constitutional magnitude, the sentence must be set aside. See, e.g., United States v. Malcolm, 432 F.2d 809, 816 (2d Cir. 1970) ("Misinformation or misunderstanding that is materially untrue regarding a prior criminal record, or material false assumptions as to any facts relevant to sentencing, renders the entire sentencing procedure invalid as a violation of due process"). See also United States v. Messer, 785 F.2d 832 (9th Cir. 1986); Barton v. Lockhart, 762 F.2d 712 (8th Cir. 1985); United States v. Lemon, 723 F.2d 922 (D.C. Cir. 1983); United States v. Tobias, 662 F.2d 381 (5th Cir. 1981), cert. denied, 457 U.S. 1108 (1982); United States v. Robin, 545 F.2d 775 (2d Cir. 1976); United States v. Stein, 544 F.2d 96 (2d Cir. 1976).

3. Mississippi also argues that Johnson did not challenge the validity of the New York conviction at his 1982

---

1 Despite Mississippi's repeated citation of and extension quotation from Johnson v. Thigpen, 806 F.2d 1243 (5th Cir. 1986), cert. denied, 107 S. Ct. 1618 (1987), that case did not find any invalid aggravating circumstance, much less one based on highly prejudicial evidence of an invalid prior conviction.

Mississippi trial or on direct appeal and that his claim is therefore barred under Mississippi law (Brief in Opp. 10). There are two fatal flaws in this argument.

First, under settled Mississippi law a defendant seeking to challenge the validity of an out-of-state conviction used in Mississippi to enhance a sentence must succeed in setting aside the challenged conviction in the jurisdiction where it was entered before he can seek relief in Mississippi. In Phillips v. State, 421 So. 2d 476, 482 (Miss. 1982), the Mississippi Supreme Court expressly ruled that a defendant must bring a proceeding "in the state in which such conviction occurred, pursuant to that state's established procedures. Should such proceeding in the foreign state succeed in overturning the conviction, then relief should be sought in Mississippi by petition for writ of error coram nobis." That is exactly what Johnson did here. There is no procedural bar here, since, in the words of the Mississippi post-conviction review statute, the bar applies only to the failure to raise issues "which were capable of determination at trial and/or on direct appeal." Miss. Code Ann. § 99-39-21(1) (Supp. 1986) (emphasis supplied).[2] Having made the strategic choice to rely on a 20-year old out-of-state conviction which it blindly accepted and chose not to investigate, Mississippi is in no position to invoke a newly minted procedural bar rule after its sister state, pursuant to the procedures contemplated in Phillips, has vacated the conviction.[3]

---

2 In opposing post-conviction relief, the State did not argue below that petitioner's claim based on the invalid 1963 New York conviction was procedurally barred.

3 Except for setting out a long quotation from the opinion below (Brief in Opp. 8-9) Mississippi ignores the fact

(Footnote continued on next page)

Second, the Mississippi Supreme Court has no clearly announced or strictly followed procedural bar rules, but has routinely considered issues not raised on direct appeal in post-conviction proceedings. In Wheat v. Thigpen, 793 F.2d 621, 625 n.3 (5th Cir. 1986), cert. denied, 107 S. Ct. 1566 (1987), the Fifth Circuit exhaustively reviewed the Mississippi Supreme Court's invocation of procedural bar in death cases and found that the Mississippi Supreme Court has "repeatedly ignored its rule prohibiting the raising of claims for the first time on writ of error coram nobis, if in fact the rule existed." The Fifth Circuit noted that federal district courts sitting in Mississippi have held that the Mississippi Supreme Court's procedural bar rules do not constitute an adequate and independent state ground and found its "affection for procedural bars to be particularly unseemly." 793 F.2d at 626-27 n.5.

4. This Court has never considered whether a state may use a prior conviction in a sister state to enhance a criminal sentence -- much less to put a defendant to death -- and at the same time refuse to recognize a subsequent decision by the sister state vacating that same conviction. The issue

---

(Footnote continued from preceding page)

that Johnson followed the procedure set out in Phillips. A portion of that quotation attempts to distinguish Phillips, arguing that introducing evidence of an invalid prior conviction to show defendant to be a habitual criminal is error because in such a case the judge must impose the maximum sentence for the later conviction but that no error is involved in putting an invalid prior conviction before the jury in a capital case because the jury is nonetheless free not to impose a death sentence. The distinction lacks all logic and is plainly made up for this occasion.

presented is serious and important, not only because death is a qualitatively different punishment but because the failure to give full faith and credit permits Mississippi to impose any form of enhanced punishment on the basis of a conviction later determined to be a nullity. If Johnson's 1963 New York conviction had been reversed prior to his 1982 trial in Mississippi, the full faith and credit clause would have prohibited Mississippi from introducing that conviction as an aggravating circumstance. The fact that the conviction was not reversed until after the 1932 trial should make no difference, particularly since, as explained in the amicus brief filed by the Attorney General of the State of New York in support of the petition, the reversal occurred on direct appeal in New York because Johnson had earlier been denied his right to appeal (N.Y. Att. Gen. Brief 9-14).

In denying post-conviction relief in this case, the Mississippi Supreme Court stated emphatically that "a foreign state cannot vitiate the death penalty verdict in this state by setting aside a prior conviction of a violent crime through a collateral relief petition" (Pet. 7a; 511 So. 2d at 1338).[4] Nonetheless, Mississippi argues here that the Mississippi Supreme Court did not refuse to give full faith and credit to the judgment of the New York Court of Appeals (Brief in Opp. 12), and that even if it did deny full faith and credit, this "would not have changed the outcome of the decision of the court below" (Brief in Opp. 13) because Johnson's death sentence is supported by other aggravating circumstances that do not depend on full faith and credit.

---

4 The opinion of the court below is now officially reported as Johnson v. State, 511 So. 2d 1333 (Miss. 1987).

Beyond ignoring the rule of Tucker and Townsend that there must be resentencing whenever materially untrue information about a prior criminal record is considered by the sentencer, Mississippi's argument simply reads full faith and credit out of the Constitution on a local option basis.

5. The Fifth Circuit has determined, after a comprehensive review of the Mississippi cases, that the Mississippi Supreme Court does not apply any limiting construction to the "especially heinous, atrocious or cruel" circumstance. See Johnson (Edward Earl) v. Thigpen, supra, 806 F.2d at 1246-47. Mississippi appears to be one of only three states that do not require the sentencing judge to give any instruction explaining or limiting this circumstance. The failure to channel the jury's discretion by either a limiting construction or a limiting instruction renders the "especially heinous, atrocious or cruel" aggravating circumstance unconstitutional as applied in Mississippi.[5] See Cartwright v. Maynard, supra, 822 F.2d at 1491 (invalidating Oklahoma's "especially heinous, atrocious or cruel" circumstance as applied); Proffitt v. Florida, supra, 428 U.S. at 255-56; cf. Godfrey v. Georgia, 446 U.S. 420, 428-29 (1980) ("wanton or vile" circumstance unconstitutionally vague because its meaning "can only be the subject of sheer speculation"). In Commonwealth of

---

5 There can be no question that this issue has been properly preserved. Johnson's lawyers objected to the use of the "especially heinous, atrocious or cruel" aggravating circumstance at trial, raised it as an issue on his direct appeal, and raised it again in his petition for post-conviction relief; Mississippi does not contend otherwise here. There is no requirement under the Mississippi post-conviction review statute or in this Court's authorities that a defendant seek certiorari on each issue raised on direct appeal in order to preserve each such issue for post-conviction review. Cf. Hawthorn v. Lovorn, 457 U.S. 255, 261 (1982); Reece v. Georgia, 350 U.S. 85, 87 (1955).

Pennsylvania v. Nelson, 523 A.2d 728, 737 (Pa. 1987), cert. denied, 56 U.S.L.W. 3320 (U.S. Nov. 2, 1987), the Supreme Court of Pennsylvania held that the failure to instruct the jury on the meaning of "torture" as an aggravating circumstance required the reversal of a death sentence, because the "use of the word 'torture' without further elaboration of that term" did not "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,'" citing Godfrey v. Georgia, supra, 446 U.S. at 428.

CONCLUSION

For the reasons stated above and in our petition for certiorari, the writ should be granted.

Respectfully submitted,

Clive A. Stafford Smith
SOUTHERN PRISONERS' DEFENSE
COMMITTEE
185 Walton Street, N.W.
Atlanta, Georgia 30303
(404) 688-1202

Laurence T. Sorkin*
Anthony Paduano
CAHILL GORDON & REINDEL
(a partnership including
professional corporations)
80 Pine Street
New York, New York 10005
(212) 701-3000

Attorneys for Petitioner
Samuel Bice Johnson

*Counsel of Record

November 23, 1987

AMICUS CURIAE

BRIEF

(5)

Supreme Court, U.S.
FILED
OCT 20 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-5468

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SAMUEL BICE JOHNSON,

Petitioner,

vs.

THE STATE OF MISSISSIPPI,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

ROBERT ABRAMS
ATTORNEY GENERAL OF THE
STATE OF NEW YORK
120 Broadway
New York, New York 10271
(212) 341-2250

O. PETER SHERWOOD
Solicitor General

SUZANNE M. LYNN
SUSAN JACOBS
BARRY BASSIS
Assistant Attorneys General
Of Counsel

43pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	2
STATEMENT OF CASE	3
ARGUMENT	6
CONCLUSION	18
APPENDIX	19

TABLE OF AUTHORITIES

Cases	Page
Adams v. State, 202 Miss. 68, 30 So.2d 593 (Miss. 1947)	15
Berger v. United States, 295 U.S. 78 (1935)	15
Burrell v. McMann, 51 Misc. 2d 185 (N.Y. Sup. Ct. 1966)	12
Farmland Dairies v. Barber, 65 N.Y.2d 55, 478 N.E.2d 1314, 484 N.Y.S.2d 713 (1985)	8
Gelb v. Royal Globe Ins. Co., 798 F.2d 38 (2d Cir. 1986)	14
Hampton v. McConnel, 3 Wheat. 234 (1818)	7
Imbler v. Pachtman, 424 U.S. 409 (1976)	17
Johnson v. Muelberger, 340 U.S. 581 (1951)	7
Johnson v. State, 477 So. 2d 196 (Miss. 1985), *cert. denied*, 106 S. Ct. 1958 (1986), *reh'g denied*, 106 S. Ct. 2930 (1986)	5
Johnson v. State, DP No. 43 (Miss. May 27, 1987) (opinion of Mississippi Supreme Court denying motion for post conviction relief)	*passim*
Johnson v. State, DP No. 43 (Miss. July 15, 1987) (order of Mississippi Supreme Court denying motion for rehearing)	6
Kellogg v. State, 504 P.2d 440 (Okla. Crim. App.) (1972)	8

	Page
Milliken v. Meyer, 311 U.S. 457 (1941)	6
Nelson v. George, 399 U.S. 224 (1938)	8
People v. Bolla, 112 Misc. 2d 703, 447 N.Y.S.2d 398 (N.Y. Sup. Ct.)(1982)	15
People v. Callaway, 24 N.Y.2d 127, 247 N.E.2d 128, 299 N.Y.S.2d 154 (1969)	10, 12
People v. Cooks, 67 N.Y.2d 100, 500 N.Y.S.2d 503, 491 N.E.2d 676 (1986)	12
People v. Crimmins, 38 N.Y.2d 407, 343 N.E.2d 719, 381 N.Y.S.2d 1 (1976)	
People v. Hairston, 10 N.Y.2d 92, 176 N.E.2d 90, 217 N.Y.S.2d 77 (1961)	10, 12
People v. Johnson, 69 N.Y.2d 339, 506 N.E.2d 1177, 514 N.Y.S.2d 324 (1987) (per curiam), *rev'g*, 125 A.D.2d 1008, 509 N.Y.S. 789 (N.Y. App. Div.) (1986)	*passim*
People v. Montgomery, 24 N.Y.2d 130, 247 N.E.2d 130, 299 N.Y.S.2d 156 (1969)	3, 10, 11
People v. Rivera, 39 N.Y.2d 519, 349 N.E.2d 825, 384 N.Y.S.2d 726 (1976)	10, 11, 13
People v. Thomas, 47 N.Y.2d 37, 389 N.E.2d 1094, 416 N.Y.S.2d 573 (1979)	10, 16
People v. Wilkins, 28 N.Y.2d 213, 269 N.E.2d 803, 321 N.Y.S.2d 87 (1971)	8

	Page
People v. Willis, 79 A.D.2d 1036, 435 N.Y.S.2d 38, (App. Div.)(1981)	8
People v. Zimmer, 51 N.Y.2d 390, 414 N.E.2d 705, 434 N.Y.S. 206 (1980)	15
Phillips v. State, 421 So.2d 746 (Miss. 1982)	8
Underwriters National Assurance Company v. North Carolina Life and Accident and Health Insurance Guaranty Association, 455 U.S. 691 (1982)	7
Wisconsin v. Pelican Insurance Co., 127 U.S. 265 (1888)	8
CONSTITUTION, STATUTES, REGULATIONS AND RULES	
U.S. Const. art. IV § 1	6
ABA Model Rules of Professional Conduct, Rule 3.8(a) (1980)	15, 17
New York Criminal Procedure Law § 400.20 (McKinney 1983)	
§ 440.10 (McKinney 1983)	4, 11, 12
§ 460.10(1)(a) (McKinney 1983)	4, 13
§ 460.30 (McKinney 1983)	4
Art. 460 (McKinney 1983)	4
New York Penal Law § 70.06(1)(b)(i) (McKinney Supp. 1987)	7
§ 70.10(1)(b) (McKinney 1975)	7
N.Y.S.B.A. Code of Professional Responsibility Canon 7 EC-7-13 (1970)	15, 17

	Page
Miss. Code. Ann. § 49-19-81 (Supp. 1982)	7
§§ 99-39-1 *et seq.* (Supp. 1986)	5
Rules of the Supreme Court, Rule 36.4	1
OTHER SOURCES	
Bellacosa, McKinney's Consolidated Law of New York Annotated, Practice Commentaries to Criminal Procedure Law §§ 440.10, 460.30 (1983)	10
Professional Responsibility Report of the Joint Conference, 44 ABAJ 1159 (1958)	16

No. 87-5468

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SAMUEL BICE JOHNSON,

Petitioner,

vs.

THE STATE OF MISSISSIPPI,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The State of New York, by its Attorney General, Robert Abrams, submits this brief *amicus curiae* pursuant to Supreme Court Rule 36.4 in support of Samuel Bice Johnson's petition for a writ of certiorari to the Supreme Court. Mr. Johnson was convicted of murder in a Mississippi court and sentenced to die. One of the aggravating circumstances cited by the jury as justification for the death penalty was Mr. Johnson's previous conviction in New York for assault in the second degree.

The Mississippi Supreme Court upheld the sentence although the New York Court of Appeals had vacated Mr. Johnson's

conviction and dismissed the underlying indictment subsequent to the Mississippi trial. In refusing to give full faith and credit to the New York court's vacatur and dismissal, the Mississippi court made crucial mistakes concerning applicable New York law and the nature of the proceedings leading to the Court of Appeals' action.

Because the consequences of Mississippi's refusal to recognize the validity of the New York court's vacatur are so grave and because the reasons for the refusal call into question the integrity of the New York court proceedings, the Attorney General submits this brief in order to clarify the record before this Court.

SUMMARY OF ARGUMENT

Full faith and credit considerations require that if a state chooses to use another state's convictions to enhance its criminal penalties, it must give equal recognition to a sister state's vacaturs. In fact, both New York and Mississippi law call for evenhanded recognition of sister states' judgments and vacaturs.

In refusing to recognize the New York Court of Appeals' vacatur of Johnson's 1963 conviction, the Mississippi Supreme Court made crucial errors concerning New York law. It characterized the New York conviction as final despite the New York court's ruling that it was the unappealed judgment of a trial court and that the state's actions had prevented Johnson from exercising his right to appeal. The Court of Appeals' vacatur was in accordance with settled principles of New York law.

The Mississippi Supreme Court also mischaracterized the New York Court of Appeals' vacatur as a ruling on a collateral relief petition. In fact, the New York trial court was initially petitioned by Johnson for post-conviction relief. However, when it ordered a resentencing nunc pro tunc, the proceeding was converted to a direct appeal.

Further, Mississippi implied that the post-conviction relief proceedings in New York were not truly adversarial. In fact, the

district attorney in Monroe County actively opposed all of Johnson's substantive claims and the Appellate Division denied relief. The only point which the prosecutor conceded was that Johnson had been denied his right to appeal through the state's misfeasance. In so conceding, the prosecutor was fulfilling his ethical obligation to see that justice was done.

STATEMENT OF CASE

In a per curiam opinion this year, the New York Court of Appeals vacated Johnson's 1963 conviction and dismissed the underlying indictment, holding that he had been denied his constitutional right to appeal:

> It is undisputed that defendant was never advised of his right to appeal from the assault conviction and that, upon discovering that right, he made several timely and diligent *pro se* attempts to obtain review of the judgment through the avenues available to him at the time. Further, it is undisputed that the actions of this State prevented defendant from ever obtaining the review of the conviction to which he was entitled. *People v. Johnson*, 69 N.Y.2d 339, 341, 506 N.E.2d 1177, 514 N.Y.S.2d 324 (1987).

Additionally, New York's high court concluded that the interests of justice would not be served by a new trial since "... the records of defendant's trial have been lost, ... neither reconstruction nor a new trial is possible and ... defendant has raised appealable issues with possible merit." 69 N.Y.2d at 342.

In 1963 Johnson, then a resident of Monroe County, New York, was convicted of assault in the second degree. He was sentenced to a prison term of 1½ – 3 years and served one year before being paroled. Johnson was not advised at sentencing by either his lawyer or the court of his right to appeal, *id.* at 341, a failure which under New York law entitles a defendant to resentencing so he may appeal. *People v. Montgomery*, 24 N.Y.2d 130, 247 N.E.2d 130, 299 N.Y.S.2d 156 (1969).[1]

---

[1] The New York Court of Appeals has applied *Montgomery* retroactively. *See infra* pp. 10-11.

When he discovered that he had the right to appeal, Johnson repeatedly petitioned for permission to do so, but his attempts were thwarted several times. *People v. Johnson*, 69 N.Y.2d at 341. In 1967 he filed a *pro se* notice of appeal. (A. 1)[2] This notice was dismissed by a court clerk in Monroe County who deemed the notice "untimely," not knowing that Johnson had not initially been advised of his right to appeal. (A. 2)

Between 1967 and 1971 Johnson filed two *pro se* petitions alleging a denial of his right to appeal. These applications were denied, and Johnson filed a notice of appeal from one of these denials. (A. 3-10) The Monroe County public defender's office was appointed to represent Johnson on the appeal, but that office never perfected the appeal, a failure which it later admitted. (A. 11) Thus, as it stood in 1986, Johnson's 1963 conviction was the unappealed judgment of a trial court.[3]

In 1982 in Mississippi, Johnson was convicted for capital murder and sentenced to death. The jury found three aggravating circumstances justifying imposition of the death penalty, but the one relied on most heavily by the prosecution was Johnson's 1963 assault conviction in New York.[4]

---

[2] "A. ____" references are to documents appended hereto which were typset from handwritten and typewritten documents contained in the Joint Appendix submitted to the New York Court of Appeals by the Monroe County District Attorney and Johnson's attorneys.

[3] Article 460 of the New York Criminal Procedure Law (McKinney 1983) governs the taking and perfecting of appeals. In an appeal as of right, Johnson would have had to file a notice of appeal within 30 days of the imposition of his sentence. N.Y. Crim. Proc. Law § 460.10(1)(a) (McKinney 1983). N.Y. Crim. Proc. Law § 460.30 (McKinney 1983), discussed at p. 10 below, provides for extensions of time for taking an appeal. As of 1986, however, Johnson's notice of appeal was not filed.

[4] The Mississippi Supreme Court said that the admission of the assault conviction as an aggravating circumstance could not be considered harmless error since it was heavily relied upon by the prosecutor in seeking the death penalty. *Johnson v. State*, DP No. 43, slip op. at 6 (Miss. May 27, 1987) (opinion of Mississippi Supreme Court denying motion for post-conviction relief).

After Johnson's conviction and sentence were affirmed on direct appeal by the Mississippi Supreme Court, *Johnson v. State*, 477 So.2d 196 (Miss. 1985), he petitioned this Court for a writ of certiorari which was denied, *Johnson v. Mississippi*, 106 S. Ct. 1958 (1986) (Brennan and Marshall, J.J., dissenting). His petition for rehearing was also denied. *Johnson v. Mississippi*, 106 S. Ct. 2930 (1986).

On August 4, 1986 Johnson filed a motion for post-conviction relief under the Mississippi Uniform Post-Conviction Relief Act, Miss. Code Ann. §§ 99-39-1 *et seq.* (Supp. 1986), and on August 4, 1986 the Mississippi Supreme Court granted a stay of execution (then scheduled for August 6, 1986). Simultaneously, Johnson again attacked his New York conviction in the New York courts. On July 30, 1986, Johnson amended his petition for post-conviction relief in Mississippi to reflect the New York Court of Appeals decision vacating his 1963 conviction and dismissing the indictment. In so doing, Johnson was following Mississippi law. To determine if a prior conviction in another state is constitutionally valid, Mississippi law requires a defendant to challenge the conviction in the other state:

> [A]ny such proceeding should be brought in the foreign state in which such conviction occurred, pursuant to that state's established procedures. Should such proceeding in the foreign state succeed in overturning the conviction, then relief should be sought in Mississippi by petition for writ of error coram nobis. *Phillips v. State*, 421 So.2d 476 (Miss. 1982) at 481-482.

On May 27, 1987 the Mississippi Supreme Court held that despite New York's vacatur of the 1963 conviction, Johnson was not entitled to resentencing. *Johnson v. State*, DP No. 43, slip op. at 9. The court held that "a foreign state cannot vitiate the death penalty verdict in this state by setting aside a prior conviction of a violent crime through a collateral relief petition." Slip op. at 7. Further, the Mississippi court found that the New York proceedings were not "adversarial" because the State's

attorney had "no significant interest or concern in vouchsafing the validity of his [Johnson's] 1963 conviction . . ." Slip op. at 8.

In a dissenting opinion joined by two judges, Justice Robertson criticized the majority for "tak[ing] a swipe at the New York action suggesting that the Court of Appeals' March 24, 1987 order should be given less than full faith and credit." Slip op. at 19. The dissenting opinion concluded that "vitiation of Johnson's 1963 New York conviction undermines confidence in the outcome of the penalty phase of his capital murder trial." Slip op. at 23.

The Mississippi Supreme Court denied petitioner's request for rehearing on July 15, 1987. *Johnson v. State*, DP No. 43 (Miss. July 15, 1987).

ARGUMENT

I. IT IS A VIOLATION OF THE FULL FAITH AND CREDIT CLAUSE OF THE U.S. CONSTITUTION FOR ONE STATE TO RECOGNIZE A SISTER STATE'S CONVICTIONS FOR ENHANCEMENT OF ITS OWN CRIMINAL PENALTIES BUT REFUSE TO RECOGNIZE A SISTER STATE'S VACATURS IN THE SAME CONTEXT

The New York Court of Appeals vacated the petitioner's 1963 conviction, which was the principal aggravating circumstance supporting the death penalty in this case. The Mississippi Supreme Court's refusal to recognize the decision of New York's highest court declaring a New York conviction invalid violated the full faith and credit clause of the Constitution. Art. IV, § 1. That clause "precludes any inquiry into the merits of the cause of action, the logic or consistency of the decision, or the validity of the legal principles on which the judgment is based." *Milliken v. Meyer*, 311 U.S. 457, 462 (1941). The wisdom of this holding is demonstrated by this case, where the decision of the Mississippi court misapprehends the law of New York as well as the facts concerning the New York proceedings.

The full faith and credit clause of the Constitution, U.S. Const. art. IV, § 1, declares a national policy of respect and recognition for a state's judgments by sister states. This policy is considered central to our federal system. *Underwriters National Assurance Company v. North Carolina Life and Accident and Health Insurance Guaranty Association*, 455 U.S. 691 (1982). Underlying this policy is a recognition of the need to develop a national jurisprudence and to prevent endless relitigation of issues. "[T]he judgment of a state court should have the same credit, validity and effect in every other court of the United States, which it had in the state where it was pronounced." *Id.* (quoting *Hampton v. McConnel*, 3 Wheat. 234, 235 (1818) (Marshall, C.J.)). *See also Johnson v. Muelberger*, 340 U.S. 581, 584 (1951) (purpose of the clause is to "help weld the independent states into a nation by giving judgments within the jurisdiction of the rendering state the same faith and credit in sister states as they have in the state of the original forum.")

Although there may be no constitutional requirement that one state use another state's convictions to enhance punishment of habitual offenders, once a state chooses to do so, full faith and credit considerations require giving equal recognition to a sister state's vacaturs. New York and Mississippi both have sentencing statutes which enhance punishment of habitual offenders for prior convictions. Mississippi Code Ann. § 49-19-81 (Supp. 1982); N.Y. Penal Law § 70.06(1)(b)(i) (McKinney Supp. 1987), § 70.10(1)(b) (McKinney 1975). Both also have mechanisms to challenge convictions after they are used as enhancements and to provide for reductions of punishment if a challenge is effective.

In this case, Mississippi used a New York conviction to enhance a sentence — in fact, to impose the death penalty. Mississippi now refuses to respect New York's vacatur of the same conviction, apparently because it disagrees with the outcome. Yet the Mississippi Supreme Court held in a similar case that a defective prior conviction which is used for enhancement is voidable, and a successful challenge in a sister state should result in relief

from the habitual offender status in Mississippi. *Phillips v. State*, 421 So.2d 746 (Miss. 1982).[5]

There are limitations on the scope of the full faith and credit clause but they do not apply here. For instance, a state need not enforce a foreign state's criminal judgments. *Nelson v. George*, 399 U.S. 224 (1938); *Wisconsin v. Pelican Insurance Co.*, 127 U.S. 265 (1888). However, the habitual offender statutes merely require recognition of a sister state's penal judgments, not enforcement of a penal law. The rationale for this exception is that the sovereignty of each state entitles it to decide what conduct is prohibited within its boundaries.

Those states which have grappled with the effect to be given a sister state's criminal judgments have found that the full faith and credit clause supports recognition of such judgments. For instance, in *Farmland Dairies v. Barber*, 65 N.Y.2d 51, 478 N.E.2d 1314, 484 N.Y.S.2d 713 (1985) the New York Court of Appeals recently held that the full faith and credit clause required New York to give the same effect to a New Jersey criminal judgment as New Jersey had done. In so doing, that court emphasized the distinction between enforcing a sister state's penal laws and giving effect to that state's judgment. *See also, Kellogg v. State*, 504 P.2d 440 (Okla. Crim. App. 1972) in which the Oklahoma court held that it would be required to recognize a vacatur of a sister state whose conviction it had used, although ruling that a pardon was not a vacatur.

Thus, the full faith and credit clause required Mississippi to recognize New York's vacatur of petitioner's 1963 conviction.

---

[5] New York also allows a defendant to challenge the use of a prior conviction to enhance sentences on subsequent felonies. *People v. Wilkins*, 28 N.Y.2d 213, 269 N.E.2d 803, 321 N.Y.S.2d 87 (1971); N.Y. Crim. Proc. Law § 400.20 (McKinney 1983). A successful challenge either in New York or in a sister state will result in a reduced sentence in New York.

New York recognizes other state's post-conviction vacaturs as well as their convictions. *See, e.g., People v. Willis*, 79 A.D.2d 1036, 435 N.Y.S.2d 38, (App. Div. 1981) where the Appellate Division, Second Department, vacated an

(Footnote continued)

II. THE MISSISSIPPI SUPREME COURT SERIOUSLY MISREPRESENTED NEW YORK LAW IN ITS DECISION NOT TO HONOR THE COURT OF APPEALS' VACATUR.

The Mississippi Supreme Court's refusal to give full faith and credit to the New York vacatur of the conviction is attributable to the court's failure to understand the nature of the proceedings that led to the reversal of the conviction and the history of Johnson's efforts to vacate his conviction.

The Mississippi Supreme Court's fundamental confusion about the New York law under which the 1963 conviction was vacated is revealed when it states:

> [I]n this case, we do not address whether a prior conviction can be used as an aggravating circumstance if that conviction is subsequently reversed on direct appeal. We do hold that a foreign state cannot vitiate the death penalty verdict in this state by setting aside a prior conviction of a violent crime through a collateral relief petition. *Johnson v. State*, DP No. 43, slip op. at 7.

In so ruling, the Mississippi court substantially misrepresented New York law. It misconstrued New York's law on untimely appeals, it mischaracterized the vacatur as a ruling on a collateral relief petition rather than one on a direct appeal and it mistakenly considered the 1963 conviction as

A.

The Mississippi court's failure to understand that the New York Court of Appeals acted on a direct appeal indicates its

---

enhanced sentence because of pos.-conviction proceedings in Texas. Texas dismissed an indictment which had been used to enhance Willis' sentence in New York. The Appellate Division followed Texas law in its decision. "In view of the interpretation given by the State of Texas to its own statute, we hold that upon the withdrawal of the defendant's guilty plea and the dismissal of the indictment against him, he reverted to the status of a first felony offender." *Willis*, 79 A.D.2d at 1037.

ignorance about the New York courts' long-standing protection of the right to appeal.

The right to appeal a criminal conviction which Johnson sought is an interest of paramount importance in New York. As the Court of Appeals, by then Judge Fuchsberg, clearly stated:

> In New York State, every defendant has an absolute and fundamental right to appeal a conviction. The denial of that right constitutes as much a failure of due process as would the denial of the right to a trial itself, and where its denial or serious obstruction comes about because of poverty, it constitutes a denial of equal protection as well. *People v. Rivera*, 39 N.Y.2d 519, 522, 349 N.E.2d 825, 384 N.Y.S.2d 726 (1976) (citations omitted).

Indeed, the right to appeal is so important that under some circumstances, appeals will be allowed notwithstanding long lapses of time. *People v. Montgomery*, 24 N.Y.2d 130. For example, the right to appeal out of time has been allowed in cases where the defendant's right to appeal was denied through no fault of his own. Thus, in *People v. Hairston*, 10 N.Y.2d 92, 176 N.E.2d 90, 217 N.Y.S.2d 77 (1961) an out-of-time appeal was allowed because uncooperative prison officials had prevented a defendant from filing a timely notice of appeal. Similarly, in *People v. Callaway*, 24 N.Y.2d 127, 247 N.E.2d 128, 299 N.Y.S.2d 154 (1969) an out-of-time appeal was allowed because the defendant relied on assigned counsel's assurance that an appeal would be taken.

Recognizing the importance of a defendant's right to appeal, the New York Legislature codified *Montgomery* in 1971. N.Y. Crim. Proc. Law § 460.30 (McKinney 1983); *see also* Bellacosa, Practice Commentary McKinney's Consolidated Laws of N.Y. Crim. Proc. Law § 460.30 at 34. Although this section includes a one year extension of time in which to take an appeal, the Court of Appeals has held that it does not impose an absolute bar to appeals taken beyond the one year extension, especially where a defendant has made efforts to take a timely appeal. *People v. Johnson*, 69 N.Y.2d 339, *People v. Thomas*, 47 N.Y.2d

37, 389 N.E.2d 1094, 416 N.Y.S.2d 573 (1979). Thus, here, where Johnson made persistent efforts to appeal his conviction and appointed counsel and court personnel failed to assist him to perfect in a timely manner, the New York Court of Appeals' reversal of Johnson's conviction is consistent with well settled law in this state.

The New York Court of Appeals has fashioned different relief according to the facts of each case in which an appeal was not timely filed or perfected. In *People v. Montgomery*, 24 N.Y.2d 130 and *People v. Rivera*, 39 N.Y.2d 519, the Court of Appeals held that where a defendant's right to appeal had been dissipated by a court-appointed attorney's failure to file or prosecute an appeal or where the defendant had not been advised of his right to appeal, defendant was entitled to resentencing nunc pro tunc so that the time for appeal would run anew. *Montgomery*, 24 N.Y.2d at 134; *Rivera*, 39 N.Y.2d at 521-522.

Johnson's case was decided in accordance with *Montgomery* and *Rivera*. In *Rivera*, the Court of Appeals reversed a 23 year old conviction for reasons strikingly similiar to those in this case. The defendant had not been advised of his right to appeal at sentencing in 1953, and was resentenced nunc pro tunc in 1973. However, after resentencing, he could not appeal because no record of his trial existed and the trial transcript was unavailable. The case was therefore remitted for a new trial.

Johnson made a motion pursuant to N.Y. Crim. Proc. Law § 440.10[*] to vacate his conviction in Monroe County on July 30, 1986 in accordance with the procedure set forth in *Montgomery*.

---

[*] N.Y. Crim. Proc. Law § 440.10 (McKinney, 1983), entitled Motion to Vacate Judgment, states in pertinent part:

> 1. At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that:
>
> . . .
>
> (h) The judgment was obtained in violation of a right of the defendant under the constitution of this state or of the United States.

His primary claim was that the conviction was invalid because he was not told of his right to appeal when he was sentenced.[7] On October 29, 1986, the Monroe County court granted the motion to the extent that it ordered that Johnson be resentenced to permit him to take a direct appeal from his 1963 conviction. From that point the New York procedures were pursuant to direct appeal, not *coram nobis*. *People v. Johnson*, Index 32/36 (County Court, Monroe Ct. Oct. 29, 1986). Resentencing under these circumstances necessarily raised for review the conviction from which the appeal was taken. *See People v. Callaway*, 24 N.Y.2d 127; *People v. Hairston*, 10 N.Y.2d 92.

Johnson then appealed his conviction to the intermediate appellate court — the Appellate Division, Fourth Department. That court held that Johnson was procedurally barred from appeal. *People v. Johnson*, 125 A.D. 2d 1008, 509 N.Y.S.2d 789 (App. Div. 1986). Johnson sought and was granted leave to appeal to the Court of Appeals. Thus, the New York court vacated Johnson's 1963 conviction on direct appeal in accordance with its precedents. *People v. Johnson*, 69 N.Y.2d 339.[8]

---

[7] Besides claiming that he had been unconstitutionally denied his right to appeal, Johnson's 1986 motion pursuant to New York Crim. Proc. Law § 440.10 (McKinney 1983) included two other claims: that no hearing was held on the voluntariness of his confession, and that the alleged confession resulted from post-indictment interrogation without the presence of counsel.

[8] Under New York law, a vacatur on a collateral attack is equivalent to one on a direct appeal. While Johnson's appeal was begun procedurally as a *coram nobis* petition, the ultimate ruling was on a direct appeal. The question, however, of what procedure was used to obtain the vacatur is a distinction without a difference under New York law. Contrary to what the Mississippi court has suggested, a conviction which has been vacated pursuant to a petition under N.Y. Crim. Proc. Law § 440.10 (McKinney 1983) is as much a nullity as one vacated pursuant to a direct appeal. *People v. Cooks*, 67 N.Y.2d 100, 491 N.E.2d 676, 500 N.Y.S.2d 503 (1986); *Burrell v. McMann*, 51 Misc.2d 185 (N.Y. Sup. Ct. 1966); N.Y. Crim. Proc. Law § 440.10 (McKinney 1983). Furthermore, a collateral attack, on an issue such as newly discovered evidence, undermines confidence in the outcome of the trial as readily as issues raised on direct appeal based on the trial record.

The relief granted to Johnson by the New York Court of Appeals was the only appropriate remedy under the circumstances. In Johnson's case, as in *Rivera*, the trial transcript is unavailable, witnesses are deceased, trial counsel is unavailable and the complainant cannot be found. However, unlike in *Rivera*, Johnson was able to raise the existence of appealable issues in his first trial — specifically whether his confession was obtained via coercion and subsequently illegally introduced as evidence. Thus, the proper remedy in *Johnson* was vacatur and dismissal of the indictment, while in *Rivera*, where no appealable issues were demonstrated, a new trial was properly ordered.

Thus, the Mississippi Supreme Court misinterpreted New York law by deeming Johnson's 1986 attack on his New York conviction as collateral. While his petition was initially so styled, once the request for resentencing was granted, the case proceeded as a direct appeal of a criminal conviction.

B.

The Mississippi Supreme Court found that Johnson's 1963 conviction was final:

> If his crime was serious enough for him to have been convicted and final enough for him to serve time in a penal institution, it had sufficient finality to be considered as an aggravating circumstance by a jury of this state. No death penalty verdict based upon this conviction can be vitiated by the subsequent relief granted more than twenty years later by the New York Court of Appeals. *Johnson v. State*, DP No. 43 slip op. at 8.

The conclusion reached by the court has no basis in New York law. Johnson's conviction was not final because his appeal had never been perfected pursuant to N.Y. Crim. Proc. Law § 460.10 (McKinney 1983) — because of the State's action none of his appellate remedies had been exhausted. As the New York Court of Appeals found, based on undisputed records, "[Johnson's]

timely efforts to appeal were ... thwarted by the State." *People v. Johnson*, 69 N.Y.2d 339, 341.[9]

Indeed, facts found at a criminal trial cannot be used against the convicted defendant in a later civil action if he has been denied the right to an appeal. *Gelb v. Royal Globe*, 798 F.2d 38 (2d Cir. 1986). In that case, Gelb had been convicted of arson and mail fraud, served his sentence and his conviction was affirmed on appeal. However, the appellate court expressly refused to decide whether Gelb had set the fire in question. Because Gelb was denied an adjudication on appeal, the Second Circuit held that Gelb was not collaterally estopped from relitigating the issue of whether he had set the fire. Therefore, if the denial of an appeal precludes finality for purposes of a civil law suit, it should certainly preclude finality where the conviction is the basis of a sentence of death.

III. MISSISSIPPI'S ATTACK ON THE INTEGRITY OF THE PROCEEDINGS IN THE NEW YORK COURTS IS UNWARRANTED

The Mississippi Supreme Court sought to justify its failure to recognize the New York judgment by attacking the integrity of the New York proceedings as well as the conduct of the State's attorney. The Mississippi court wrote:

> [T]here is no evidence or indication that the post-conviction relief proceedings in the New York courts were truly adversarial ... the state's attorney in New York had no significant interest or concern in vouchsafing the validity of his 1963 conviction, and we find no challenge by the state's attorney of New York of Johnson's petition. *Johnson v. Mississippi*, DP No. 43 slip op. at 8.

[9] The claim by the Mississippi Supreme Court that "there is nothing to suggest [that Johnson] took any steps to vacate this conviction until he filed this petition", *Johnson v. State*, DP No. 43, slip op. at 5, is inaccurate. As the record shows (see pg. 4 above) Johnson tried for years to have his conviction vacated.

The Mississippi Supreme Court's implication that the prosecution functioned as a rubber stamp for Johnson's defense is completely unsupported by the record. Precisely because he was concerned about "vouchsafing the validity" of Johnson's conviction, the prosecutor was careful to conform to professional standards in representing the state's interests in this case.

The role of a public prosecutor in a criminal proceeding is to search out the truth and insure a fair process. "[A prosecutor's] mission is not so much to convict as it is to achieve a just result." *People v. Zimmer*, 51 N.Y.2d 390 at 393, 414 N.E.2d 705, 434 N.Y.S. 206 (1980). *See also Berger v. United States*, 295 U.S. 78 (1935); *People v. Bolla*, 112 Misc.2d 703, 447 N.Y.S.2d 398 (N.Y. Sup. Ct. 1982). This is the national rule for prosecutors. *See also* ABA Model Rules of Professional Conduct, Rule 3.8 (1980), NYSBA Code of Professional Responsibility Canon 7, EC 7-13 (1970). The Supreme Court of Mississippi itself has stressed the role of the prosecuting attorney in ensuring fairness. "[I]n conducting a criminal case, the prosecuting attorney must be fair and impartial *and see that defendant is not deprived of any constitutional or statutory rights*". *Adams v. State*, 202 Miss. 68, 30 So.2d 593 (Miss. 1947) (emphasis in original).

In his papers in response to Johnson's 1986 *coram nobis* petition, the district attorney agreed only that Johnson had demonstrated that his right to appeal had been denied:

> We respectfully urge that petitioner has demonstrated that he was deprived of, and is now entitled to, his right to appeal. We flatly deny that the prosecution did anything to deprive him of any other right ... petitioner is not entitled to any other remedy. Affirmation of Melvin Bressler to County Court, Monroe Co., Indictment No. 32/1963, (Sept. 23, 1986) (A. 14-16).

The district attorney's response clearly demonstrates an interest in the proceedings and a desire to challenge some of Johnson's claims.

The Monroe County district attorney's position in the Appellate Division was consistent with his position in the county

court – that the petitioner had established his right to appeal the 1963 conviction. The district attorney also stated that Johnson's appeal was not barred by N.Y. Crim. Proc. Law § 460.30 (McKinney 1983), (see Sec II above) because that statute had been passed after Johnson had filed his *coram nobis* petition, conceding that subsequent changes in the law should not affect the rights Johnson had sought and was denied in 1963. (A. 17) The Appellate Division did not agree, and held the appeal to be time-barred. *People v. Johnson*, 125 A.D.2d 1008.

New York's highest court reversed the intermediate court and agreed with the prosecutor that petitioner's appeal was not barred:

> In these special circumstances, the People, *as they correctly concede*, cannot rely upon a subsequently imposed time limitation to prevent a defendant from obtaining appellate review of his conviction. (*People v. Thomas*, 47 N.Y.2d 37.) *People v. Johnson*, 69 N.Y.2d at 341 (emphasis added).

Mississippi mistakenly asserts that the New York proceedings "lacked an essential adversarial ingredient." *Johnson v. State*, DP No. 43, slip op. at 8. Clearly, prosecutors may not be adversarial merely for the sake of a good argument:

> The public prosecutor must recall that he occupies a dual role, being obligated, on the one hand, to furnish that adversarial element essential to the informed decisions of any controversary but being possessed on the other of important governmental powers that are pledged to the accomplishment of one objective only, that of impartial justice. *Professional Responsibility Report of the Joint Conference*, 44 ABAJ 1159, 1218 (1958).

In criminal proceedings, prosecutors have the duty to disclose to the defense and to the court any evidence available to them which "tends to negate the guilt of the accused, mitigate the degree of the offense or reduce the punishment." ABA Model

Rules of Professional Conduct, Rule 3.8(d), NYSBA Code of Professional Responsibility EC 7-13. Even after a conviction, a prosecutor is "bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction." *Imbler v. Pachtman*, 424 U.S. 409, page 427, fn.25 (1976). The New York prosecutor comported with these standards in conducting an independent investigation of the case and informing the courts of his findings.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Supreme Court of Mississippi.

Dated: New York, New York
October 16, 1987

Respectfully submitted

ROBERT ABRAMS
ATTORNEY GENERAL OF THE STATE
OF NEW YORK
120 Broadway
New York, New York 10271
(212) 341-2250

O. PETER SHERWOOD
Solicitor General

SUZANNE M. LYNN
SUSAN JACOBS
BARRY BASSIS
Assistant Attorneys General
Of Counsel

APPENDIX

NOTICE OF APPEAL

COUNTY OF MONROE
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—vs.—

SAMUEL BICE,

Appellant.

Sir:

Please take notice that Samuel Bice, the Appellant herein, hereby appeals to the Appellate Division of the Supreme Court in and for the Fourth Judicial Department from a judgment rendered in the Monroe County Court on the 9th day of April, 1963 convicting appellant of Assault in the Second Degree, and appellant hereby appeals from said conviction, from every part and from the whole thereof.

Dated: Attica, New York
January 16, 1967

Sworn to before me this
16th day of January, 1967

Respectfully submitted,
Samuel Bice
Appellant in Pro Se
Box 169, Attica, N.Y.

Notary Public
Ralph Y. Bittone

Clerk of Monroe County Court
Civic Center Plaza
Rochester, State of New York

Box 149
Attica, N.Y. (14011)
Date January 16, 1967

Samuel Bice 22616.

This Appeal is not timely.

Do Not Get out the record at this time.

s/John R. Reardon

THE PEOPLE OF THE STATE OF NEW YORK,

—vs.—

SAMUEL BICE,

Appellant.

---

to Appellate Division Fourth Judicial Department

Honorable Sirs:

The appellant, Samuel Bice, was indicted by the Monroe County Grand Jury for the crime of Assault in the Second Degree on or about the 25th day of February, 1965, and does not know the indictment number.

Hereafter a jury trial was had in the Monroe County Court on said charge of Assault in the Second Degree and a verdict was rendered on or about the 28th day of March, 1965 finding appellant guilty as charged in said indictment.

Appellant feels that there is merit to his cause of action in that his Constitutional rights were violated (1) that appellant was not informed at the time of his arrest of his right to remain silent and that anything appellant said could be self incriminating (2) that was no probable cause for his arrest (3) that the verdict as rendered by the trial jury was against the weight of evidence and that the error in denying appellant motion to dismiss at the close of the people's case.

Wherefore appellant prays for an order of this honorable Court granting him permission to appeal as a poor person from the judgment of conviction entered in the Monroe County Court on the 9th day of April, 1968.

Sworn to before me this
16th day of January 1967

Respectfully submitted

s/Samuel Bice

Appellant in Pro Se
Box 149, Attica, N.Y.

Notary Public
Ralph Y. Bittone

WRIT OF CORAM NOBIS

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents,

—vs.—

SAMUEL BICE,

Defendant.

New Yo.': State)
County of Monroe) ss:
City of Buffalo)

Samuel Bice, being duly sworn deposes and says that he is the petitioner herein and makes this Notice for a Writ of Error Coram Nobis, for the relief sought herein Pro-Se, that he is fully aware of the facts and allegations herein based on the trial records of this Court.

The Defendant was held at Elmira Reformatory at Elmira, New York upon verdict of guilty after trial. Defendant was sentenced by Honorable Judge John P. Lomenzo, on or about April 4, 1963 to a term of from 1½ years to 3 years in Elmira Reception Center at Elmira, New York which term Defendant has already served.

Your Defendant's contentions are that no appeal was ever filed on behalf of Defendant's Rights to Appeal.

Petitioner relies upon the Doctrine of *People v. Montgomery*, 24 N.Y.2D 130; *People v. Callaway*, 27 N.Y.2D 127; also *People v. Ransey*, 23 N.Y.2D 656; *People v. Sillivan*, 32 A.D.2D 514, *People v. Sacharske*, 31 A.D. 892; *People v. Stewart*, 26 A.D. 2D 842, *People v. Winslow*, 31 A.D.2D 561, see also *Rodrigues v. U.S. Supra*, Rule 32 of Criminal Procedure for the United States District Courts.

The Court of Appeals recently stated on this issue that every Defendant has a fundamental right to appeal his conviction. Basic Fairness and Due Process require that said right not be dissipated because the Defendant was either unaware of its existence, or because counsel did not abide by a promise to prosecute an appeal. When an attorney fails to appraise his client of this vital privilege, there is no satisfaction for having the Defendant suffer from his attorney's failing. *People v. Montgomery, supra,* and *People v. Allaway, supra.*

The New York State Court of Appeals has recently stated on this issue that every defendant has a fundamental right to challenge the constitutionality of his conviction. Basic Fairness and Due Process require that said right not be dissipated because the Defendant was either unaware of its existence, or because counsel did not abide by a promise to prosecute an appeal. The Courts insist that defendants be informed of their basic right to appeal. When an attorney fails to appraise his Writ of this vital privilege, there is no justification for making the defendant suffer for his attorney's failing. *People v. Montgomery, supra, People v. Callaway, supra.*

Wherefore petitioner prays that this Honorable Court will grant the relief sought herein and any other relief this court will deem just and proper.

Sworn to before me
this 3rd day of January, 1971
s/
Notary Public

s/Samuel Bice
Samuel Bice #62405
Petitioner Pro-Se

Monroe County Court
Clerk's Office
Rochester, New York 14610
454-7200, Ext. 224

January 13, 1971

Mr. Samuel Bice, #62405
135 State Street
Auburn, N. Y. 13022

Dear Sir:

This acknowledges receipt of your letter of January 5th, 1971 enclosing your application for a Writ of Error, Coram Nobis, verified on the same day.

Be advised that this matter has been placed on the Motion Calendar for February 17th, 1971.

Very truly yours,

Howard T. Eichorn
Chief Court Clerk

HTE:c

cc: District Attorney

Monroe County Court
Clerk's Office
Rochester, New York 14610

NOTICE TO DEFENDANT
SAMUEL BICE

Pursuant to Rule X, subdivision 3 of the Appellate Division, Fourth Department, effective September 1st, 1967, you are hereby advised that it reads as follows:

3. Notification to Defendants Who Appear Without Counsel

A. After conviction or denial of Coram Nobis.

If a defendant has appeared pro se, the Trial Court shall advise a defendant of his right to appeal and of the right of a person unable to pay the cost of an appeal to apply for leave to appeal as a poor person. If the defendant so requests, the clerk of the Court shall prepare and file and serve forthwith a Notice of Appeal on behalf of the defendant.

Dated: Rochester, New York
9th day of March, 1971

MONROE CONTY COURT
BY: JOHN R. REARDON
Chief Court Clerk

NOTE: A Notice of Appeal must be filed and served within 30 days after judgment of conviction or service of order appealed from.

Check one and return:

__✓__ I wish to appeal

____ I do not with to appeal.

s/Samuel Bice
Defendant

Monroe County Court
Clerk's Office
Rochester, New York 14610
454-7200, Ext. 224

March 12, 1971

Mr. Samuel Bice #62405
135 State Street
Auburn, N. Y. 13022

Dear Sir:

Receipt of your request that this office file a Notice of Appeal in your behalf is hereby acknowledged. The Notice of Appeal was filed and served on the 12th day of March, 1971.

Very truly yours,

s/ Howard T. Eichorn
Howard T. Eichorn
Chief Court Clerk

HTE:c

PEOPLE OF THE STATE OF NEW YORK,

Respondents,

— vs. —

SAMUEL BICE,

Appellant.

SIRS:

PLEASE TAKE NOTICE, that the Defendant-Appellant in the above entitled action hereby appeals to the Appellate Division of the Supreme Court, Fourth Department, from an Order of Monroe County Court, Edward O. Provenzano, J., denying an application for a Writ of Error, Coram Nobis, entered in the Office of the Clerk of the County of Monroe on the 5th day of March 1971.

This Notice of Appeal prepared, filed and served at the request of Samuel Bice, defendant, Pursuant to Rule, Subdivision 3, Appellate Division, Fourth Department.

BY: HOWARD T. EICHORN
County Court Clerk
Monroe County

TO: District Attorney* NYSIIS #778268X
201 Hall of Justice
Rochester, New York

Monroe County Clerk*

* Names are illegible in original.

STATE OF NEW YORK
COUNTY COURT, MONROE COUNTY

THE PEOPLE OF THE STATE OF NEW YORK,

— against —

SAMUEL BICE JOHNSON,

Defendant-Petitioner.

Indictment No. 32 (1963)

STATE OF NEW YORK)
: ss.:
COUNTY OF MONROE)

AFFIDAVIT OF EDWARD J. NOWAK

Edward J. Nowak, being duly sworn, deposes and says that:

1. My name is Edward J. Nowak and I am the Public Defender of the County of Monroe, New York. I maintain an office in the Executive Office Building, 10 North Fitzhugh Street, Rochester, New York 14614. I submit this Affidavit in support of petitioner's motion to vacate judgment of conviction.

2. Prior to my being appointed Public Defender in April, 1977, I was Chief of the Appeals Bureau in the Office of the Public Defender, from 1976 to April, 1977. For a period of some years, centering around 1970-71 and thereafter, the Office of the Public Defender came under intense public criticism for the inadequacy of its representation of indigent defendants. The office at that time was severely under-funded and under-staffed. By 1971, the quality of representation provided by the Office had deteriorated to the point that, in 1972, the Monroe County Legislature contracted with the National Legal Aid and Defender's Association to evaluate the quality of its representation of indigent defendants. The resulting report was severely critical of management, administration, and services provided by the Office during the 1971-73 period.

3. I have reviewed the papers submitted by Samuel Bice Johnson in support of his motion to vacate his conviction by this Court in 1963 for second degree assault. It is my opinion, based on many years of representing criminal defendants in Monroe County and in the Supreme Court of New York, Appellate Division, 4th Department, that a court of competent jurisdiction in New York very likely will declare Johnson's conviction invalid and unconstitutional as a matter of law, and will issue an order vacating such conviction.

4. The grounds for relief alleged by Johnson are meritorious and present important issues under the laws of New York and the United States Constitution. Any one of Johnson's principal claims -- custodial interrogation without presence of counsel, absence of post-conviction hearing to determine the voluntariness of his confession, failure of this Court to advise him of his right to appeal, and the State's failure to provide competent appellate counsel -- is in my judgment sufficient ground to vacate the 1963 conviction. Together the grounds present an argument for post-conviction relief which, in my judgment, a New York court will find highly compelling.

5. Johnson's case is particularly compelling given that the State of New York has lost or destroyed critical records pertaining to the 1963 conviction, including the trial transcript, the jury instructions and the purported confession made by Johnson. It is beyond dispute that a New York court will at the very least set aside the 1963 conviction and order an evidentiary hearing as mandated by *People v. Huntley*, 15 N.Y.2d 72, 255 N.Y.S.2d 838 (1965), to examine the issues raised by Johnson. It is my judgment, however, that the 1963 conviction should and will be vacated, given the seriousness and fundamental nature of the constitutional error demonstrated by Johnson, together with the irremediable prejudice to his rights caused by the State's loss of essential trial records, and the fact that Johnson has already served his prison term for a conviction infected with constitutional error.

6. Johnson alleges that he received ineffective assistance of appellate counsel from this Office with respect to proceedings

for post-conviction relief in 1971-72. I understand from examination of the records of this Office, and from information received from the Clerk's office of the Supreme Court of New York, Appellate Division, 4th Department, that in 1971 Johnson filed a Notice of Appeal. Upon docketing Johnson's appeal, the Appellate Division, 4th Department, appointed the then Monroe County Public Defender, Nicholas Varlan, to represent Johnson in this appeal. However, for reasons of which I am not aware, but which surely were related to the difficult conditions under which the Office labored during that time, Johnson's appeal was never acted upon in any way by the Public Defender's Office.

[CONFORMED COPY; EXECUTED AND NOTARIZED JULY 30, 1986]

EDWARD J. NOWAK

Sworn and Subscribed to
before me this ____ day
of July, 1986

Notary Public

AFFIRMATION

State of New York
County of Monroe
County Court

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents,

— vs —

SAMUEL BICE JOHNSON,

Petitioner.

I. Melvin Bressler, an attorney admitted to practice in this state, affirm, under penalty of perjury, that the following statement is true to the best of my knowledge.

A. History and Background

1. I am an assistant district attorney in Monroe County, NY, and I have familiarized myself with the history and prior proceedings in this case. I made this affirmation in response to the *coram nobis* application (CPL 440.10) made by petitioner and pending before the court.

2. Petitioner was convicted of assault under the former penal law in 1963. He now seeks post-conviction relief claiming that he was not afforded his right to appeal from that conviction, and also that a statement by him was improperly used against him at his trial in 1963.

3. Petitioner further claims that the records of his trial, most importantly including a trial transcript, have not been preserved.

4. Based on the affidavits provided by Petitioner, it is clear that petitioner never timely filed a notice of appeal. That failure in turn resulted in the trial minutes not being transcribed. The court stenographer is deceased, and it does not appear that his notes were preserved.

5. It also appears clear that no motion for a bearing to test the voluntariness of petitioner's statement was made before or during his trial.

B. The Present Petition.

6. Based on the affidavit of petitioner's former trial attorney, as well as the attorney for the petitioner's co-defendant, we accept the fact that petitioner was not properly informed of his right to appeal, in 1963. That being so, we urge that this court can remedy that error by vacating the sentence and ordering petitioner resentenced so that he can commence an appeal now. If that is done, we believe that each of the claims petitioner now makes can be dealt with in the appeal.

7. Having concluded that petitioner was entitled to an opportunity to appeal, we so informed petitioner's counsel, assuming that would end the necessity of this proceeding. Petitioner's counsel has written to the court arguing that petitioner is inste ad entitled to have the conviction vacated on the grounds stated in the Petition.

8. We disagree that: petitioner is entitled to any other relief based on the papers before the court.

9. When examined carefully, it becomes clear that petitioner's real complaint is that he was ineffectively represented by his attorney during the pre-trial and trial stages of his prosecution.

9. There is no allegation that petitioner ever moved for suppression or in any way called to the trial court's attention a complaint about the statement made by petitioner. There was certainly no requirement that either the court or the prosecution do anything other than what they did. We realize that the trial

was held before this area of the law and this right of a defendant was fully determined by the courts. Nevertheless, no legitimate claim can be made (or is being made) that any agent of the state deprived petitioner of any right. That being so, petitioner is simply not entitled to any relief on that ground. His remedy, if any, is that his attorney did not fully inform him of his rights.

10. If, in fact, petitioner makes such claim, it stands on considerably different footing than a claimed deprivation by the state of some fundamental right. Petitioner would first be required to show his attorney failed to properly represent petitioner in some way, and next that this "failure" contributed to the conviction.

11. All that is before the court presently is an affidavit saying that a statement by petitioner was used at his trial by the prosecution, and a claim that this use was improper. Accepting these statements as true, that is not enough. Petitioner must also show why that issue was not presented to the trial court, which has not been done. The implication -- unstated -- is that this was a failure of his right to effective counsel.

12. We respectfully urge that petitioner has demonstrated that he was deprived of, and is now entitled to, his right to appeal. We flatly deny that the prosecution did anything to deprive him of any other right. On the papers before the court, petitioner is not entitled to any other remedy.

WHEREFORE, we respectfully ask the court to afford petitioner his right to appeal, and to otherwise deny his petition.

Affirmed under penalty of perjury,
September 23, 1986.

s/Melvin Bressler

COUNTY OF MONROE
Office of the
DISTRICT ATTORNEY

HOWARD R. RELIN
DISTRICT ATTORNEY
TELEPHONE 716-428-5680

November 28, 1986

Appellate Division,
Fourth Judicial Department
301 Hall of Justice
Rochester, NY 14614

Re: Samuel Bice Johnson; pending motion.

May it Please the Honorable Court:

Samuel Bice was tried and convicted, with a codefendant after a jury trial of assault, second degree, under the former Penal Law, in 1963. Bice now uses the name "Johnson" and we will so refer to him.

Johnson was not advised of his right to appeal from that 1963 conviction. It is not clear what happened to his purported Notice of Appeal, but the then clerk of the County Court concluded, correctly, that the Notice was untimely, and directed that the transcript not be prepared (see Appendix at A 32).

We agree with the defendants' contention that he had the right to appeal from that conviction, and was entitled to be resentenced so he could take an appeal (*People v Montgomery*, 24 NY2d 130). Although the law today may be different (see, e.g., CPL 460.30-1), we believe that any later changes could not affect the rights Johnson had in 1963.

In August, 1986, Johnson moved for post-conviction relief (CPL 440.10) in Monroe County Court, seeking various forms

of relief from the 1963 conviction. Apparently agreeing that Johnson had the right to appeal, the court granted a portion of his motion, and resentenced him. He has filed a Notice of Appeal from that resentence, and has also moved for summary judgment, on that grounds that there is no trial record worthy of the name, and that reconstruction of the trial is impossible. We respectfully submit this letter in place of a formal memorandum in response to the pending motion.

Based on our own investigation, we agree with defendant's contention.

The court reporter has died, and, as noted above, there is no trial transcript. We tired to locate the victim and the co-defendant, and were unsuccessful. We turned such records as we had over to defense counsel prior to the coram nobis application; those records by no stretch of the imagination would enable counsel to prepare an appellate argument. Our records are incomplete, but on information and belief, the trial judge and prosecutor are also deceased. Current counsel for Johnson has contacted the former attorneys for both Johnson and his co-defendant. Their affidavits are part of the appendix (A 8; A 11), and they each have said they cannot remember sufficient details to reconstruct the trial.

The determination of the motion for summary judgment is of course addressed to the court's discretion. We are unable to provide any additional information that would aid the court in its exercise of that discretion. We would respectfully point out however, that we have no reason to believe that a hearing would develop any additional information.

Respectfully Submitted,

HOWARD R. RELIN
District Attorney of Monroe County

s/Melvin Bressler
By: Melvin Bressler
Assistant District Attorney

MB/lb
cc: Laurence Sorkin, Esq.

Supreme Court, U.S.
FILED
FEB 19 1988
JOSEPH F. SPANIOL, JR.
CLERK

(6)

No. 87-5468

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SAMUEL BICE JOHNSON,
Petitioner,

v.

STATE OF MISSISSIPPI,
Respondent.

On Writ of Certiorari to the Supreme Court of Mississippi

JOINT APPENDIX

LAURENCE T. SORKIN *
ANTHONY PADUANO
CAHILL GORDON & REINDEL
(a partnership including
professional corporations)
80 Pine Street
New York, New York 10005
(212) 701-3000

CLIVE A. STAFFORD SMITH
SOUTHERN PRISONERS' DEFENSE
COMMITTEE
185 Walton Street, N.W.
Atlanta, Georgia 30303
(404) 688-1202

Attorneys for Petitioner
Samuel Bice Johnson

MICHAEL C. MOORE
Attorney General of Mississippi
MARVIN L. WHITE, JR.*
Assistant Attorney General
P.O. Box 220
Jackson, Mississippi 39205
(601) 359-3680

Attorneys for Respondent
State of Mississippi

* Counsel of Record

PETITION FOR CERTIORARI FILED SEPTEMBER 14, 1987
CERTIORARI GRANTED JANUARY 11, 1988

143PP

TABLE OF CONTENTS

	Page
Chronological List of Relevant Docket Entries	1
Order Admitting Testimony and Exhibits Into Evidence, Circuit Court, Pike County, Filed September 3, 1982	4
Certified Copy of Commitment to Reception Center, Introduced as Exhibit at September 3, 1982 Sentencing Hearing	6
Excerpts from Transcript of September 3, 1982 Chambers Conference (Objections to Judge's Instructions to Jury) (Tr. 2196-97)	10
Excerpts from Transcript of September 3, 1982 Sentencing Hearing (Judge's Instructions to Jury) (Tr. 2263-70)	12
Excerpts from Transcript of September 3, 1982 Sentencing Hearing (Prosecutor's Closing Argument) (Tr. 2271-87)	19
Excerpts from Transcript of September 3, 1982 Sentencing Hearing (Jury Findings and Verdict) (Tr. 2288-90)	31
Final Judgment, Circuit Court, Pike County, Filed September 3, 1982	33
Opinion of Mississippi Supreme Court Affirming Conviction and Death Sentence, Filed May 8, 1985	35
Excerpts from Petitioner's Motion for Post-Conviction Relief, §§ II, III, Filed August 4, 1986	89
Excerpts from Respondent's Response to Petitioner's Application for Leave to File Motion for Post-Conviction Relief, Filed November 6, 1986	92
Letter dated March 26, 1987 from Anthony Paduano, Esq., petitioner's counsel, transmitting certified copy of the March 24, 1987 judgment of the New York Court of Appeals to the Mississippi Supreme Court	94
Opinion of Mississippi Supreme Court Denying Post-Conviction Relief, Filed May 27, 1987	98

TABLE OF CONTENTS—Continued

Page

Affidavits submitted to County Court for Monroe County, New York, in support of Motion to Vacate Judgment of Conviction in *People* v. *Johnson*, Index 32/63, Filed July 30, 1986 122

Order of the Supreme Court of the United States granting certiorari and leave to proceed in forma pauperis, January 11, 1988 140

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Mississippi Proceedings

September 3, 1982	Judgment entered by Circuit Court for Pike County, Mississippi (Hon. L.D. Pittman) sentencing petitioner to death after jury found him guilty of capital murder and imposed death sentence
September 13, 1982	Petitioner's notice of appeal filed with Mississippi Supreme Court
May 8, 1985	Opinion of Mississippi Supreme Court affirming petitioner's conviction of capital murder and death sentence
November 6, 1985	Order of Mississippi Supreme Court denying petitioner's motion for rehearing
May 5, 1986	Denial of petition for writ of certiorari by U.S. Supreme Court
June 16, 1986	Denial of petition for rehearing by U.S. Supreme Court
July 16, 1986	Order of Mississippi Supreme Court setting execution date for August 6, 1986
August 4, 1986	Petitioner's motion for post-conviction relief under Mississippi Uniform Post-Conviction Relief Act, Miss. Code Ann. §§ 99-39-1 *et seq.* (Supp. 1986), and for stay of execution filed with Mississippi Supreme Court
August 4, 1986	Order of Mississippi Supreme Court granting stay of execution until further order of court
March 26, 1987	Certified copy of March 24, 1987 judgment of the New York Court of Appeals

	vacating petitioner's 1963 New York conviction filed with Mississippi Supreme Court
April 25, 1987	Petitioner's supplemental memorandum in support of motion for post-conviction relief based on vacatur of 1963 New York conviction filed with Mississippi Supreme Court
May 27, 1987	Opinion of Mississippi Supreme Court denying petitioner's motion for post-conviction relief and setting execution date for July 22, 1987
June 4, 1987	Petitioner's motion for a stay of execution pending filing of a petition for writ of certiorari filed with Mississippi Supreme Court
June 11, 1987	Petitioner's motion for rehearing filed with Mississippi Supreme Court
July 13, 1987	Order of Mississippi Supreme Court granting stay of execution pending further order of court
July 15, 1987	Order of Mississippi Supreme Court denying petition for rehearing

New York Proceedings

July 30, 1986	Motion and supporting affidavits filed by petitioner pursuant to N.Y. Crim. Proc. Law § 440.10 (McKinney 1963) in the County Court for Monroe County, New York, seeking to vacate 1963 conviction for second degree assault
September 25, 1986	Argument before Judge John J. Connell of Monroe County Court on petitioner's motion for post-conviction relief
October 25, 1986	Opinion of Judge Connell finding that petitioner was never advised of right to appeal in 1963 and directing that petitioner be resentenced to permit a direct appeal

November 12, 1986	Sentencing hearing before Judge Connell at which petitioner, after waiving right to be personally present, is resentenced to 1½-3 years in prison, with court noting that petitioner has already served his time
November 17, 1986	Notice of appeal and motion for summary reversal filed by petitioner in Appellate Division, Fourth Department
December 3, 1986	Order of Appellate Division, Fourth Department, denying motion for summary reversal
December 12, 1986	Order of Appellate Division, Fourth Department, denying motion for rehearing
January 11, 1987	Order of Hon. Richard D. Simons, Associate Judge of New York Court of Appeals, granting leave to appeal to New York Court of Appeals
March 24, 1987	Opinion of New York Court of Appeals reversing order of Appellate Division, vacating 1963 conviction and dismissing indictment

IN THE CIRCUIT COURT
OF PIKE COUNTY, MISSISSIPPI

No. 12567-D

STATE OF MISSISSIPPI

—versus—

SAMUEL JOHNSON a/k/a SAMUEL BICE

ORDER

September 3, 1982

THIS DAY, this cause came on to be heard on motion of the State for the Court to enter its order accepting into evidence (at the sentence phase of the trial of this cause) any and all testimony, together with any and all exhibits thereto, and/or general exhibits proffered by the State of Mississippi and accepted into evidence at the guilt phase of the trial of this cause, and the Court after having heard and considered the same, being fully advised in the premises, is of the opinion and so finds that said motion is well taken and should be sustained.

IT IS, THEREFORE, ORDERED AND ADJUDGED, that any and all testimony, together with any and all exhibits thereto, and any and all general exhibits proffered by the State of Mississippi and accepted into evidence by this Court at the guilt phase of the trial of this cause should be, and the same hereby is, accepted into evidence, at the sentence phase of the trial of this cause; and that all such testimony and exhibits should be and the same hereby are, incorporated herein by reference

and made a part of the record of this cause as fully as if set out in words and figures herein.

SO ORDERED AND ADJUDGED, this the 3d day of September, 1982.

/s/ L. D. Pittman
L. D. PITTMAN
Circuit Judge

IN THE CIRCUIT COURT
OF PIKE COUNTY, MISSISSIPPI

(Exhibit Introduced at Sentencing
Hearing September 3, 1982)

CERTIFICATION

28 USC 1738

STATE OF NEW YORK)

COUNTY OF MONROE)

I, PATRICIA B. ADDUCCI, Clerk of the County of Monroe, State of New York, of the County Court of said County and of the Supreme Court, both being Courts of Record having a common seal, do certify that the certificates annexed to this certificate are true and correct. Copies of the originals on file and of record in my office in the cases of the People of the State of New York vs. Samuel Bice, a/k/a Samuel Johnson on Indictment No. 32, filed February 21, 1963, Indictment No. 313 filed September 23, 1966 and Indictment No. 1057 filed November 22, 1974; and that the originals thereof constitute and are a portion of the record of such proceedings in said Court. Dated, and the seal of said Court affixed, this 23rd day of July, 1982.

/s/ Patricia B. Adducci
PATRICIA B. ADDUCCI
Monroe County Clerk

STATE OF NEW YORK)

COUNTY OF MONROE)

I, HYMAN T. MAAS, Administrative Judge of the County Court in and for the County of Monroe, State of New York, hereby certify that Patricia B. Adducci, who made and subscribed the foregoing attestation is now, and was at the time of the execution thereof, the Clerk of the County of Monroe, State of New York, of the County Court of said County, and of the Supreme Court, as set forth therein and that the foregoing attestation made by her in her official capacity is in proper form and her signature thereto is genuine. Dated, and the seal of my office affixed this 23d day of July, 1982.

[SEAL]

/s/ Hyman T. Maas
HYMAN T. MAAS
County Court Judge

COMMITMENT TO RECEPTION CENTER
NEW YORK STATE DEPARTMENT
OF CORRECTION
ELMIRA, NEW YORK

At a term of the County Court in the county of Monroe held at Rochester, New York on the 9th day of April 1963.

Present: HON. JOHN LOMENZO,
Monroe County Judge

THE PEOPLE OF THE STATE OF NEW YORK

versus

SAMUEL BICE

The defendant having been found guilty by Verdict of a Jury of a felony, to wit: Assault, Second Degree, with intent to Commit Rape, First Degree, as charged, committed on or about February 9, 1963 and it appearing to the satisfaction of the court from the evidence that the said defendant is a male person between the ages of sixteen and twenty-one years, to wit: twenty (20) years of age, it is

ORDERED, ADJUDGED AND DIRECTED by the Court, that the said Samuel Bice for the crime aforesaid, be and he hereby is sentenced to imprisonment in an institution under the jurisdiction of the New York State Department of Correction, and committed to the RECEPTION CENTER, ELMIRA, NEW YORK, for classification, program planning and transfer in accordance with

the provisions of Article 3-A of the Correction Law, for a term as set forth in paragraph 2 below:

1. A reformatory term of not to exceed five years,

2. A term of not less than 1 years and 6 months nor more than 3 years and 0 months *

A TRUE EXTRACT FROM THE MINUTES:

/s/ A. Gould Hatch
Signature
Clerk
Official Title

(* Footnote Omitted in Printing)

IN THE CIRCUIT COURT
OF PIKE COUNTY, MISSISSIPPI

(Title Omitted in Printing)

EXCERPTS FROM TRANSCRIPT OF SEPTEMBER 3, 1982 CHAMBERS CONFERENCE

(Objections to Judge's Instructions to Jury)
(Tr. 2196-97)

* * * *

(WHEREUPON, THE FOLLOWING PROCEEDINGS WERE HAD IN CHAMBERS WITH THE DEFENDANT PRESENT.)

OBJECTIONS TO INSTRUCTIONS
FOR THE STATE

BY THE COURT: PS-1. That's electing a foreman. Do you have any problem with that one?

BY MR. HARPER: The only problem I have, Judge, is it's finding him again. What does it say, Your Honor?

BY THE COURT: (Reads said instruction.)

BY MR. HARPER: No problem.

BY THE COURT: It will be given.

Now, PS-2 is a standard instruction except that we want to make sure that you put all of the mitigating circumstances in there.

BY MR. HARPER: Your Honor, I have some objections to the aggravating circumstances that are listed.

BY THE COURT: All right, give them to me.

BY MR. HARPER: Okay. On number (1), I object to this as being an aggravated circumstance in terms of remoteness of the conviction, this being a conviction that is almost 20 years old. I don't think that it should be considered by the Jury due to its remoteness.

BY THE COURT: Get me the statute on it, please.

BY MR. ROBERTS: Aggravating? It's right here.

BY MR. EVANS: I'd like this on the record. In number (2), the word "arrest" is left out after avoiding.

BY MR. HARPER: And, Judge, I'd also object on number (1) on the basis of the Sixth, Eighth and Fourteenth Amendments.

(OFF THE RECORD.)

BY THE COURT: That objection will be overruled. All right, now—

BY MR. HARPER: Your Honor, one thing I'd like to say in response to that, I know that Mr. Evans is going to comment on that previous conviction and I want it to be properly referred to and I believe that the proper conviction was a second degree assault with intent to commit first degree rape. I want it referred to as that.

* * * *

EXCERPTS FROM TRANSCRIPT OF SEPTEMBER 3, 1982 SENTENCING HEARING

(Judge's Instructions to Jury) (Tr. 2263-70)

* * * *

BY THE COURT: Ladies and Gentlemen, I will now read you the instructions or the law that you will apply in this case, or this phase of the case.

The Court instructs the jury that for this phase of the trial you shall elect from among yourselves one juror to serve as foreman. The foreman shall write your verdict on a separate sheet of paper and in the form prescribed by the instructions which follow.

You have found the Defendant, Samuel Johnson, guilty of the crime of "Capital Murder." You must now decide whether the defendant shall be sentenced to death or to life imprisonment. In reaching your decision, you must objectively consider the detailed circumstances of the offense for which the defendant was convicted, and the character and record of the defendant himself. To return the death penalty, you must unanimously find from the evidence beyond a reasonable doubt that the aggravating circumstances—those which tend to justify the death penalty—outweigh the mitigating circumstances—those which tend to justify the less severe penalty of life imprisonment. Consider only the following elements of aggravation in determining whether the death penalty should be imposed, to-wit

1) That the Defendant, Samuel Johnson, was previously convicted of a felony involving the use or threat of violence to the person of another;

2) That the Defendant, Samuel Johnson, committed the capital murder for the purpose of avoiding arrest or effecting an escape from custody;

3) The capital murder was especially heinous, atrocious and cruel,

then you must proceed to weigh the aggravating circumstances and the mitigating circumstances, one against the other, to determine whether the aggravating circumstances you have found, if any, outweigh the mitigating circumstances.

The mitigating circumstances which you may consider include the following, to-wit:

1) Any circumstance or combination of circumstances surrounding the defendant's life and character which reasonably mitigates against imposition of the death penalty.

2) Samuel Johnson's ability to adjust well to prison life without violence.

3) The defendant did not fire the gun.

4) Samuel Johnson has shown no incidents of violence in past stays in prison.

5) Samuel Johnson's only previous conviction of a felony involving the use or threat of violence to the person of another was over 19 years ago on April 9, 1963.

6) Any and all other matters, facts, and circumstances which you as jurors may consider from the evidence as mitigating.

If you unanimously find from the evidence beyond a reasonable doubt that any one or more of the aggravating circumstances listed above do exist, and if after weighing the mitigating circumstances and the aggravating circumstances, one against the other, you further find unanimously from the evidence beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances and that the death penalty should be imposed, your verdict shall be written on a

separate sheet of paper, shall be signed by your foreman, and shall be in the following form, to-wit:

> "We, the Jury, find unanimously and beyond a reasonable doubt the following aggravating circumstances, to-wit: (fill in the blanks by listing the aggravating circumstances, if any, which you unanimously find beyond a reasonable doubt from those listed above using the same language as they are listed)
>
> "We, the Jury, find unanimously from the evidence and beyond a reasonable doubt that after weighing the mitigating circumstances and aggravating circumstances, one against the other, that the aggravating circumstances do outweigh the mitigating circumstances and that the defendant should suffer the penalty of death."
>
> Signed by the foreman.

If you fail to find any aggravating circumstances unanimously and beyond a reasonable doubt, or, if you find unanimously and beyond a reasonable doubt one or more aggravating circumstances, that after weighing the aggravating circumstances and mitigating circumstances, one against the other, you fail to unanimously find beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances, then your verdict shall be in the following form, to-wit:

> "We, the Jury, find the defendant should be sentenced to imprisonment for life in the State Penitentiary."

If, after reasonable deliberation you cannot agree as to the punishment, you should certify your disagreement to the Court and the Court shall, as required by the law, impose a sentence of life imprisonment. In the event that you are unable to agree as to the punishment, your verdict shall be written on a separate piece of paper and shall be in the following form, to-wit:

> **"We, the Jury, after due deliberation have been unable to agree upon the punishment and hereby so certify the same to the Court and request the Court to dismiss the jury from further deliberation."**

The Court instructs the jury that in order to impose a sentence of death the law requires that you must reach a unanimous verdict. In the event that you do not reach a unanimous decision, the law requires that the Circuit Judge sentence the defendant, Samuel Johnson, to life imprisonment.

The Court instructs the jury it is now your duty to determine what punishment must be imposed upon Samuel Bice Johnson. You must determine which of the following punishments is appropriate to impose on Samuel Bice Johnson:

1) Life imprisonment

or

2) Death by inhalation of a lethal gas.

The Court instructs you the jury that Samuel Bice Johnson cannot be sentenced to death by inhalation of a lethal gas unless each juror finds beyond a reasonable doubt that the statutory aggravating circumstances outweigh the mitigating circumstances. Even if you find the existence of a statutory aggravating circumstance beyond a reasonable doubt, you cannot automatically impose a sentence of death. You are bound by law and your oath as jurors to consider those mitigating factors found in the statute, and any other mitigating evidence presented, you may impose a sentence of death only if you conclude beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances.

The Court instructs you that mitigating circumstances are those which do not constitute a justification or excuse for the offense in question, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability or blame.

The Court instructs the jury that a mitigating circumstance does not have to be proven beyond a reasonable doubt to exist. You must find that a mitigating circumstance exists if there is any substantial evidence to support it.

The Court instructs the jury that before Samuel Bice Johnson can be sentenced to death by inhalation of a lethal gas, the statutory aggravating circumstances must be proven beyond a reasonable doubt by the prosecution, and it must also be proven beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances. If upon the evidence in this phase of the proceedings you have any doubts as to the appropriate punishment, then you must return a verdict sentencing Samuel Bice Johnson to prison for the remainder of his natural life.

The Court instructs the jury that the law presumes that a defendant convicted of capital murder is innocent of any aggravating circumstances. The presumption of innocence is sufficient to justify a finding that no aggravating circumstances exist. Unless you are satisfied beyond a reasonable doubt of the defendant's guilt of at least one aggravating circumstance, you are instructed to return a verdict sentencing Samuel Bice Johnson to prison for the remainder of his natural life.

The Court instructs you that if you find one or more statutory aggravating circumstance proved beyond a rea-

sonable doubt, then you must consider all the evidence tending to establish one or more mitigating circumstances and give that evidence and those mitigating circumstances such weight as you feel they should be given. If the weight of the mitigating circumstances is equal to or exceeds the weight of the aggravating circumstances, you must return a finding of life imprisonment for Samuel Bice Johnson.

The Court instructs the jury that you must consider any evidence of mitigating circumstances. However, you cannot consider any aggravating factors not specifically mentioned. If you have a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances, you are obligated to resolve that doubt in favor of the defendant and return a finding of life imprisonment.

The Court instructs the jury that you are not required to make a special finding of any mitigating circumstances in order to return a verdict that the accused should be sentenced to life in prison. However, before you may reach a verdict that the accused should suffer the penalty of death, you must unanimously find in writing that after weighing the mitigating circumstances and the aggravating circumstances, one against the other, the mitigating circumstances do not outweigh the aggravating circumstances and the accused should suffer the penalty of death.

The Court instructs the jury that in your weighing of mitigating and aggravating circumstances the number of either is wholly immaterial and must not be so considered by you, but instead, that you must consider the same in terms of their individual importance and effect upon your minds as jurors, which is to say, by way

of example, that one of either of such circumstances, standing alone, may, if it satisfies your minds as jurors, outweigh all multiple other circumstances.

* * * *

EXCERPTS FROM TRANSCRIPT OF SEPTEMBER 3, 1982 SENTENCING HEARING

(Prosecutor's Closing Argument) (Tr. 2271-87)

* * * *

CLOSING ARGUMENT
ON BEHALF OF THE STATE

BY MR. EVANS: Ladies and Gentlemen, this is the very last stage of the proceedings and it follows the same procedure at this stage as followed or it did follow yesterday. I'll be allowed to open this stage and to close it. Again, we get the same amount of time, but again in this stage I have the burden, the people of Mississippi, have the burden of proving the mitigating circumstances beyond a reasonable doubt.

I'll remind you again that nothing the lawyers have to say is evidence. The evidence is everything you've heard this week, not just this morning but all week, from the witness stand and the exhibits that have been testified to.

What you have to do at this stage is to compare the aggravating circumstances, which, as the Judge told you, are the ones that justify your verdict directing Judge Pittman to enroll the sentence of death against Samuel Johnson. You compare those against the mitigating circumstances, the ones that say he should receive the less severe, a life sentence. You don't count them. You compare them. You weigh them. So, in other words, you can find that just one aggravating circumstance was so important and weighed so heavy that it outweighed every one of the other mitigating circumstances. You could find that every mitigating circumstance that you consider does, in fact, exist and you could find that only one aggravating circumstance—for instance, the one that says Billy was an officer acting in his line of duty—if I could get the wording exactly right. Excuse me. "That

Samuel Johnson committed the capital offense for the purpose of avoiding arrest or effecting an escape from custody." You could find that that one was so great that it outweighed all the others. Then that would justify your verdict, which would direct Judge Pittman to enroll the sentence of death.

When looking at these aggravating circumstances for the purposes of getting ready to compare them, I think the logical place to start would be Samuel Johnson's participation, which we have already discussed and which we've already seen. It was, as I said the first day and this is the last day I'll repeat it, he started it all. It was his idea to kill Billy or he wouldn't have told Otis Fairley to hand him the knife. He's the one that stabbed him. And it was Samuel Johnson that gave the order for Charles Montgomery to shoot Billy. To me, that's pretty substantial participation. And I said Monday morning that if it wasn't for Samuel Johnson, Billy would still be alive. And I said it because I believe it, because I thought I could prove it, and we have. And I still believe it. Now, are all of these facts, this evidence that's proven, when combined with Mr. Johnson's prior record, is that sufficient aggravating circumstances. You do here again today just like you did yesterday. You take the facts and you apply that to the law the Judge read you.

The first aggravating circumstance you have to see if you can determine whether it exists is that the Defendant, Samuel Johnson, was previously convicted of a felony involving the use or threat of violence to the person of another.

We have in evidence and you'll be allowed to take it back with you into the jury room when you go back, the certified copy of Samuel Johnson's conviction of second degree assault with intent to commit first degree rape. By definition, that is a violent act. Dr. Fisher said in

his expert opinion that was certainly a violent act. But with that document, you don't have to take our word for it, that it's a violent act. You can look at that document and see that that aggravating circumstance does, in fact, exist. So we know that one exists.

The second one—I want to make sure I get them right—that the Defendant, Samuel Johnson, committed the capital murder for the purpose of avoiding arrest or effecting an escape from custody.

You heard the testimony and remember the testimony of Ron Smith who said he found Billy's fingerprints on a document found in the back of the LTD. And that all the witnesses, including Otis Fairley, said that Mr. Johnson got out when Billy requested him to. That he went and stood until such point as he got the knife. Otis Fairley didn't say that, but that's what was proven. That means that Samuel Johnson wanted Billy killed in order to prevent the search of that back seat and to escape from Billy's custody when he was arrested for whatever that search revealed. So the second aggravating circumstance we know exists from the testimony we've heard this week.

The third one: the capital murder was especially heinous, atrocious and cruel.

I had to look a couple of those words up in the Dictionary, to be absolutely honest with you, and when I did I found that the word "heinous" means shockingly evil. Murder is an evil act. There'll be no argument with that from anybody, I don't think. Well, is the killing of a Highway Patrolman beside one of the busiest highways in our state shocking? Does it shock you to know that? It shocked me. Of course, you know what cruel means. To me, the cruelty of it has increased by the lack of necessity or justification. And earlier, we have talked about how unnecessary this was, about the seven or eight chances they had to leave without killing Billy. So the third one exists as well.

So if you conclude that even though only one can outweigh all the others, they all three do, in fact, exist and even if you decide to find that all the mitigating circumstances exist but these three outweigh them.

The form of the verdict you are to use is a bit complicated and I want to go over it with you just for a second because I had to do a little studying to figure out exactly how it was written myself. In the first instruction or one of the first ones, the Judge told you that the first thing you do is elect a foreman. Then you start considering, comparing and weighing the aggravated circumstances and the mitigating circumstances. When you find that the aggravating circumstances outweigh the mitigating circumstances, what your foreman does, he takes a piece of blank paper and he writes, "We, the Jury, find unanimously and beyond a reasonable doubt the following aggravating circumstances, to-wit," and it's typed right there. (Showing the Jury.) So all you've got to do is copy that. Then you turn back to the first page and you write down which one of these aggravating circumstances exist, or if you feel they all exist, you write them all. You copy them word for word just like they're written there, (1), (2), (3). Then under that, well, then you turn to this page, the third page of this long instruction, which has been marked right PS-2. You turn to the third page—it's the only three-page instruction in there—and you write—your foreman writes, "We, the Jury, find unanimously from the evidence and beyond a reasonable doubt that after weighing the mitigating circumstances and aggravating circumstances, one against the other, that the aggravating circumstances do outweigh the mitigating circumstances and that the Defendant should suffer the penalty of death." Then the foreman signs his name. You list them first, (1), (2), (3), the ones you find. Then you write this number under it. And the foreman and only the foreman is required to sign it.

Now, what you're considering is serious business. It's about as serious as it gets in our law and in our lives. And a lot of good-hearted and well-meaning people who don't understand the purpose and the necessity of capital punishment will probably say that I'm very cold and harsh and cruel when I stand here and I say that because of having been convicted of second degree assault with intent to commit first degree rape and capital murder that Samuel Johnson should die. But that wasn't too harsh and cold and cruel for Billy. And the decent, law-abiding people of our state has, speaking through our Legislators, said that in certain cases the death penalty is proper. And the U.S. Supreme Court has said, and the Judge told you in his instructions, that not only in certain cases is it proper, but in other cases it's just and it's necessary. The evidence in this case and the law shows you not only that it's proper, but that it is just and absolutely necessary.

This makes the tenth time that I have either tried or prepared for trial a capital murder case, and if Mr. Johnson's lawyers argue like all those others I've been involved in, they'll ask you for mercy, they'll ask you for compassion; and they'll ask you for compassion, if they're like the others, and tell you that Samuel Johnson doesn't want to die. Billy didn't want to die either. And if they argue like the others, they'll ask you for mercy and plead for Samuel Johnson's life. Billy plead for his life. But mercy wasn't in the heart of Samuel Johnson last New Year's Eve when he told Charles Montgomery twice to shoot. I don't know, they may or may not, most of the others have, try to appeal to the Christian virtues of our jurors and ask you to forgive Samuel Johnson. I'm not trying to tell you your business or be disrespectful, but forgiveness is not the privilege of this Court. That belongs to the Lord. You are here enforcing the law and judging the actions of this man. They may, like most of the others, go even so far as to tell you that if you believe in the Bible, you're not going to believe in capital punishment, you'll be opposed to it. In case they

do tell you that, I'm going to tell you this first. That's just not true. The Bible doesn't demand it, no, of course, not, it does not demand it, but it certainly does permit it. You heard Reverend Thompson read the verse, "If a man smiteth a man, so that he die, shall he surely be put to death." That was from Exodus, the Old Testament. Reverend Thompson doesn't believe in that. I don't criticise him for that. Don't think for a moment I am. He has a right to that opinion. I don't agree with Reverend Thompson, but I respect his right to his opinion and his right to hold that opinion. And Mr. Harper said he wouldn't go into the New Testament after I asked Reverend Thompson to read that, but I will just in case he decides to do it in a minute. You recall several instances where Jesus discussed those laws, those Mosaic laws, and you will remember that he never did question the validity of them. In fact, he said that as Christians we're obligated to follow the laws of the state. What he did was said before you enforce those laws, give us proof, credible, competent evidence. And the people of Mississippi have shown, over a period of a week's time, credible, competent evidence that the aggravating circumstances outweigh the mitigating circumstances. And all we're asking you to do is to enforce the law that the people of Mississippi has made. That's all. And on behalf of those law-abiding people, in a short while, I'll again ask you to announce to them that you realize and you recognize that the aggravating circumstances do, in fact, outweigh the mitigating ones and that Judge Pittman should be told by your verdict to direct that Samuel Johnson suffer the penalty of death.

BY THE COURT: Mr. Harper.

CLOSING ARGUMENT ON BEHALF OF THE DEFENDANT

BY MR. HARPER: May it please the Court, Ladies and Gentlemen, it has been a long week. I've prepared for this stage for a long time. This being a capital murder case, we had to be prepared for this in case it happened, and I have thought for well over a month what I would say if I got up here. I've thought all this week what I might say and last night and today and still don't know what all to go over with you.

I'm not here right now to discuss anybody's views on capital punishment or the Bible, the New Testament and the Old Testament in that Bible. The only thing I'm here to do right now is to ask you to spare his life. And Mr. Evans is right, I am getting up here asking for mercy. I am asking you to spare his life.

I want you to remember what Dr. Fisher said. And on this Instruction, PS-2, that Mr. Evans has referred to, there are several things that you are to consider as mitigating circumstances. I want you to study this instruction when you get back there and I want you to remember what Dr. Fisher said, that he can function in prison with that life sentence and not be violent.

I want you to remember also especially about Charles Montgomery. You've heard a lot about Charles Montgomery in this case. He's the man that the State has said and that you believe fired the gun that shot the officer. I want you to remember that no once forced Charles Montgomery to shoot. He was a grown man, an adult. If anyone told him to fire, it was his decision. He was the one. Nobody forced him to shoot the officer. And the State has told you that it was the gunshot wound that killed the officer, and I want you to remember that, that no one made Charles Montgomery pull that trigger. I ask you to remember that. I ask you to give him the same consideration, to give Sam the same consideration that was given to Charles Montgomery. I ask you to study these things.

I ask you not to consider the prior conviction, the violent conviction of Sam's in 1963. I hope that you'll be able to put that in the back of your mind and remember how long ago that was.

May I have some water?

BY THE COURT: Yes, sir.

(BRIEF PAUSE.)

BY MR. HARPER—CONTINUING: I ask you to take your time when you get back there.

You are probably wondering where his family is or why they aren't here. You know he is from Rochester, New York. He's poor. They couldn't make it. They don't have the money to make it. If they were nearby they would be here. They would've testified and they would've begged for his life.

I ask you to study the instruction here and remember those things, and I ask you to think about what it's going to be like if he goes to the gas chamber, what it will be like there, and I ask you to spare his life.

BY THE COURT: Mr. Evans.

FINAL CLOSING ARGUMENT ON BEHALF OF THE STATE

BY MR. EVANS: I can tell you what it's like. It's a gray room all the way around about like this and there's a bench in it and under that bench, there is a pail of water and above that are two pills, and the Sheriff pulls the handle that drops those pills into water. Then Sam Johnson will take a deep breath and in five or ten seconds his life will be ended. There will be no pain, there will be no agony, there will be no suffering. He won't feel a knife in his back and he won't feel a bullet exploding in his brain. And that's what it's like.

Dr. Fisher said that Samuel Johnson can adapt to prison life. My first response was that we're not here to see how Sam Johnson will adapt to prison life. What concerns me is what is going to happen the next time he decides to commit a second degree assault with intent to rape and what is going to happen the next time he decides he wants a Highway Patrolman or another law enforcement officer dead. You heard Dr. Fisher's testimony that

inside prison his potential for violence was low, but outside, it was high. I just can't get concerned about how he would adapt to prison life when I know that his potential for dangerousness on the outside is high.

Mr. Harper wants you to believe that a life sentence is sufficient punishment and that capital punishment is not proper here, but with—I'm not being critical, but he doesn't realize or he doesn't understand that capital punishment is symbolic of how much that we value innocent human life.

When you vote to tell Judge Pittman that Samuel Johnson should suffer the penalty of death, you're going to be telling Samuel Johnson and others like him who commit second degree assault with the intent to commit first degree rape and who have a high potential for violence and who murder Highway Patrolmen and other innocent people when they're doing their jobs and going about their own business, you're going to be telling them that the people of our state have the courage to rid our state of people like that; that we don't want people like that in our state, especially when they have a violent record like that and the potentiality of hurting somebody else. Dr. Fisher said we can only judge—or best judge Mr. Johnson's future actions by his past ones. And, again, he told you clearly that second degree assault with intent to commit first degree rape is a violent act; and when Sam Johnson is on the outside, his potentiality for violent acts were right the opposite. We can't afford to find out if Dr. Fisher is right or wrong. If he's right, then Sam Johnson is a dangerous person. He said Samuel Johnson failed to return from his furlough and to return to the penitentiary again and again. Yet dispite that, dispite the aggravating circumstances, dispite the fact that he spent 10 of the last 18 years off and on in the penitentiary, despite the fact that he has a high potential for future violent acts of hurting somebody else, they want you to sentence him to life. And they want you to have sympathy for him because his family is

poor. I can understand that. My family is poor, a lot of my friends' families are poor, but they don't commit second degree assault with intent to rape and they don't have a high potential for hurting people when they're outside and they don't kill Highway Patrolmen or anybody else. They don't hurt anybody. They want you to show him mercy and beg for his life. I don't have to remind you, Billy begged for his too. And show him the mercy that he showed Billy when he told Charles Montgomery to shoot him, and show him the compassion and the sympathy that he showed Billy when he drove off and left him laying in that ditch. You do that and do you know what we'll have? We'll have that which is rightly due in return for the wrong that Samuel Johnson has committed against the laws of the people of this state, against the law-abiding people of the state that Bily chose to serve, not just what's rightly due in return for the wrong he committed to Billy, but to the people that Billy was serving as well, the good, law-abiding people in our state.

Mr. Harper said that Charles Montgomery pulled the trigger on his own, nobody made him. But it was Samuel Johnson's idea to kill Billy. Samuel Johnson gave Charles Montgomery the idea to get the gun. He said, "Get his gun." When Montgomery got it, Montgomery went back to the LTD to get in it, and Samuel Johnson said, "No, shoot him. Shoot him." The first time he said shoot him, Montgomery hesitated. Then Samuel Johnson insisted, "Shoot him," and he did. No, Samuel Johnson didn't pull the trigger with his finger, but from what he did do, if he had've had the gun he would have. The murder was there in his heart.

They ask you to send Samuel Johnson to the penitentiary. Dr. Fisher said that was his home. He commits second degree assault with intent to commit first degree rape. He is returned to the penitentiary again and again. He has a high potentiality for violence and then he finally graduates to capital murder, and they want you to send him back home and live the life of Riley at the penitentiary watching TV and playing dominoes. If it wasn't for the fact that it's just so wrong, it would be funny, wouldn't it? The rest of us out here trying to do right by each other and trying to follow the law, Samuel Johnson does just the opposite and you let him go home.

You can't allow, must not allow, a misguided sense of compassion and mercy to erase our concern for justice and for our laws. And you might be saying to yourself, "Well, if I vote to tell Judge Pittman to direct that Samuel Johnson suffer the penalty of death, that won't bring Billy back." No, it won't. And it's not supposed to. That's not what our courts are for. But it will stop Samuel Johnson from hurting anybody else and it will tell others like him that we don't reward people who commit second degree assault with the intent to commit first degree rape and who are returned to the penitentiary again and again and again and who have high potentiality for violent acts and who kill law officers who are doing their jobs. It will tell them too that we have a society where our laws mean something, whether it's a society that stands for order, an orderly society. And it will tell me something too. It will tell me that Billy's life was worth as much as Samuel Johnson's and it will tell me that Billy's life went for something good and something decent and something worth while and it will tell me that, with all the imperfections it's got and with all its frustrations and with all the criticism it gets, we have a system that really does work after all. And, as I told you before, I will now, in the name of that system and the decent, law-abiding people in Mississippi, and by the authority that the ones in the Thirteenth District gave me, I'm going to ask that you retire and come back in a little while and tell Judge Pittman by your verdict, yes, we find that the aggravating circumstances do outweigh the mitigating circumstances and we find that a man who commits second degree assault with intent to commit first degree rape and a man who has been returned to the penitentiary again and again and

again, spent 10 of the last 18 years in the penitentiary, and a man who has a high potential for hurting other people and a man who has taken an innocent life when he killed an officer while that officer was enforcing the laws of our good people, has chosen himself to forfeit his life in the eyes of God and in the eyes of our law. You are not the one executing Samuel Johnson. Regardless of what they tell you, you're not the one. He chose that himself when he decided to be a criminal in 1963. So, as I said, I now ask you to retire and return shortly and tell Judge Pittman that the aggravating circumstances outweigh the mitigating circumstances and because of that, Samuel Johnson should suffer the penalty of death.

* * * *

EXCERPTS FROM TRANSCRIPT OF SEPTEMBER 3, 1982 SENTENCING HEARING

(Jury Findings and Verdict) (Tr. 2288-90)

* * * *

BY THE COURT: The Clerk will furnish the Jury the Instructions, the Exhibits and a blank sheet of paper and a pencil with which to write its verdict.

Now, the two alternates will keep your seats.

The Jury will now retire to the jury room to consider your verdict.

(Whereupon, the Jury retired to the jury room to consider their verdict at 2:51 p.m., after which the following proceedings were had.)

BY THE COURT: The two alternates will be finally dismissed. I want to thank you for coming and serving on the Jury. I believe Mr. Fortenberry has your warrants and you will be now finally dismissed. Thank you.

Do you have a way home?

(The Jurors responded in the affirmative.)

Court will be in recess to await the return of the verdict.

(Whereupon, Court recessed at 2:52 p.m. to await the return of the verdict, after which the following proceedings were had at 4:10 p.m. with the Defendant present.)

BY THE COURT: Now, when the verdict is read, there cannot be any emotion shown of the audience.

Let the Jury come in.

(Whereupon, the Jury returned to the Courtroom at 4:12 p.m., after which the following proceedings were had.)

BY THE COURT: Have you reached a verdict?

(Whereupon, a Juryman handed the verdict to the Clerk and the Clerk handed the verdict to the Court.)

The Clerk will read the verdict.

BY THE CLERK: (Reading) We, the Jury, find unanimously and beyond a reasonable doubt the following aggravating circumstances, to-wit:

(1) That the Defendant, Samuel Johnson, was previously convicted of a felony involving the use or threat of violence to the person of another;

(2) That the Defendant, Samuel Johnson, committed the capital murder for the purpose of avoiding arrest or effecting an escape from custody.

(3) The capital murder was especially heinous, atrocious and cruel.

We, the Jury, find unanimously from the evidence and beyond a reasonable doubt that after weighing the mitigating circumstances and aggravating circumstances, one against the other, that the aggravating circumstances do outweigh the mitigating circumstances and that the Defendant should suffer the penalty of death.

Signed Denman E. Cook, Foreman of the Jury.

* * * *

IN THE CIRCUIT COURT
OF PIKE COUNTY, MISSISSIPPI

No. 12,567-D

THE STATE OF MISSISSIPPI

v.

SAMUEL JOHNSON, a/k/a SAMUEL BICE JOHNSON

FINAL JUDGMENT (SENTENCING STAGE)

Came the District Attorney who prosecutes for the State and the Defendant, Samuel Johnson, a/k/a Samuel Bice Johnson, in his own proper person and with counsel, who on September 2, 1982 was found guilty of Capital Murder by a jury composed of Pamela Smith and eleven other good and lawful persons of Pike County, Mississippi and the same jury heard evidence for both the State and the defendant in the sentencing stage of the above styled and numbered cause, and after hearing all the evidence, receiving the instructions of the Court and hearing argument of counsel, retired to consider their verdict, and after considering same returned into open court upon their oaths the following verdict, to-wit:

> "We, the jury, find unanimously and beyond a reasonable doubt the following aggravating circumstances, to-wit:
>
> (1) That the defendant, Samuel Johnson, was previously convicted of a felony involving the use or threat of violence to the person of another;
>
> (2) That the defendant, Samuel Johnson, committed the capital murder for the purpose of avoiding arrest or effecting an escape from custody;

(3) The Capital Murder was especially heinous, atrocious and cruel. We, the jury, find unanimously from the evidence and beyond a reasonable doubt that after weighing the mitigating circumstances and aggravating circumstances, one against the other, that the aggravating circumstances do outweigh the mitigating circumstances and that the defendant should suffer the penalty of death.

/s/ Denman E. Cook
Foreman of the Jury:"

It is, therefore, ordered and adjudged by the Court that the defendant, Samuel Johnson, a/k/a Samuel Bice Johnson be transferred forthwith to the Mississippi State Penitentiary at Parchman, Mississippi and placed in maximum security where he shall remain until October 22, 1982, on which date he will be put to death by the proper official by the method prescribed by statute.

ORDERED AND ADJUDGED this the 3rd day of September, 1982.

Filed September 3, 1982

Glen D. Fortenberry,
Circuit Clerk

/s/ J. D. Pittman
Circuit Judge

SUPREME COURT OF MISSISSIPPI

No. 55265

SAMUEL JOHNSON, a/k/a SAMUEL BICE JOHNSON

v.

STATE OF MISSISSIPPI

May 8, 1985

En Banc.

HAWKINS, Justice, for the Court:

On December 31, 1981, around two o'clock in the afternoon Mississippi Highway Safety Patrolman Billy M. Langham, while acting in line of duty, was murdered on U.S. Highway 49 in Covington County, at the city limits of Collins. He was stabbed with a butcher knife in the back between his shoulder blades, and shot at close range with his own revolver.

Samuel Bice Johnson, one of three men indicted for his murder, following a change of venue, was tried in the Circuit Court of Pike County for capital murder, sentenced to death, and has appealed. Two other men charged in the murder, Otis Lee Fairley and Charles Montgomery, Jr., following separate trials, have been convicted of capital murder, and each sentenced to life imprisonment.

We affirm.

There is no dispute but that Langham was murdered, but it was Johnson's contention at trial and on this appeal that the murderer was Anthony Fields, who con-

stituted the fourth culprit there at the scene of trouble with Patrolman Langham. Johnson has raised numerous issues on his appeal, which we will address. First, the facts.

FACTS

Anthony Fields and Otis Lee Fairley are first cousins. On December 31, 1981, they were staying together in New Orleans. Around 10:00 that morning the two of them were picked up by Samuel Bice Johnson and Charles Montgomery, Jr., in a 1971 Ford LTD with a yellow body and brown top, Johnson driving.

Fields had seen, but never met Johnson or Montgomery prior to that morning. Montgomery rode on the front seat with Johnson with Fields on the left and Fairley on the right side of the back seat. Their destination was Collins. Fairley was born in Collins and lived there until 1968. Fields was born in Gulfport, where he lived for 15 years and then moved to New Orleans. The precise purpose of their trip to Collins is not shown in the record. Fields's mother lived in Collins, having moved there three years previously; Fairley had two sisters living there; and they both had numerous kinsmen there. Fields never lived in Collins.

En route they stopped in either Lumberton or Purvis where Fairley had a sister.

They were traveling North on Highway 49, presently four lanes with a strip between the North and South bound lanes. There are several low hills as the highway approaches Collins from the South.

At approximately 1:30 that afternoon, as they were approaching Collins, they passed Highway Patrolman Billy M. Langham, parked in a Dodge patrol car, with a blue light on top and Highway Safety Patrol decals on its sides. Langham was in uniform, wearing his badge, and armed with a .357 caliber magnum Smith and Wesson revolver.

As they passed the patrol car, Langham started after the Ford with his blue lights blinking. Johnson pulled his car over on the right shoulder and Langham parked the patrol car just a few feet to the rear. Langham walked to the driver's side of Johnson's car and asked to see Johnson's license. Johnson replied he had no license and Langham told him to get out of the car.

The state's version of what then transpired came primarily from Fields, who testified that after Johnson got out of the car Langham noticed a butcher knife on the front seat. Langham picked the knife up, put it on top of the patrol car next to the blue light, and told Johnson to go to the back of his car.

Langham then came back to the Ford car and told the other three he was going to have to search them. They also got out of the car, Langham patted all of them lightly and told them to stand by his car. Fields noticed Johnson whispering to Fairley.

Langham then went to the Ford and searched the front seat. The officer then started the search of the back seat. As he was in the process of searching the back seat, Fairley got the knife off the top of the patrol car and gave it to Johnson. Then, as the officer straightened up from searching the back seat, Johnson stabbed him in the back.

When Fields was asked on direct examination why Johnson would stab the officer, he replied it was to escape.

Fields further testified that when Johnson stabbed Langham, the officer reached for his revolver. He said Johnson then changed hands and went for the revolver, also, and the two started tussling, and Johnson kept on stabbing the officer. Johnson yelled to Fairley to "come knock him out," and after several calls Fairley suddenly ran over and started hitting Langham in the face. Johnson then yelled for Montgomery to get the officer's gun. Montgomery, who was then standing close by the scuffle,

hesitated, and then suddenly reached and grabbed the gun. Montgomery then said, "I got it."

The scuffle began by the Ford and moved back towards the patrol car. The officer looked to Fields and said, "Help." Fields did nothing.

When Montgomery got the pistol, Johnson and Fairley both ran for the car. Montgomery remained standing there with the gun on the officer. Langham asked Montgomery, "Please don't shoot me." He asked this more than once.

Montgomery was holding the gun with both hands. He took one hand off to open the car door, and Johnson, who was under the steering wheel, told Montgomery, "No, shoot the m.....f....." Montgomery hesitated, and Johnson repeated the statement.

Montgomery then put both hands on the pistol and started walking towards the officer. Fields, by this time in the back seat of the LTD, dropped his head so as not to see, and heard a shot. He then heard Montgomery say, "I got him," and Montgomery got into the car. As Johnson drove off Montgomery threw the gun out the window. The record does not reveal from Fields testimony when he got back into the car.

Johnson cursed Montgomery for throwing the gun away, slowed the car down, but because there were witnesses approaching from behind, he did not stop.

As they were driving Johnson repeatedly said he had to find another car. He parked the Ford, and they all got out and ran for a railroad track. When they got on the track, they started walking towards town. Johnson removed the sweater he was wearing and threw it beside the track, which Fields described as brown. Johnson had no clothing under the sweater. Fairley removed his sweat suit to give Johnson his t-shirt, which Johnson put on.

They spotted a yellow Mercury Comet beside the track next to a building. Johnson inspected the car, found the keys were in it, and the four of them got into the car, Johnson driving.

Fairley got on the front seat with Johnson, and Montgomery and Fields got in the back. Johnson told Montgomery and Fields to lie down, which they did.

As they were traveling in the Comet, Johnson asked the others if they thought he did the wrong thing. Montgomery and Fairley said he did the right thing, and Johnson said he'd rather be dead than go back to jail.

The Comet ran a road block at the intersections of Highways 35 and 84 in Jeff Davis County. The officers on the scene shot the tires, and the Comet stopped. Fairley and Johnson ran from the car.

Fields got out with his hands up, and was arrested. Montgomery remained in the car and was arrested.

The officers pursued Johnson and Fairley on foot, and in a short distance caught and arrested them both.

Fields pleaded guilty to the crime of accessory after the fact and was sentenced to five years. He also received three 10-year sentences for guilty pleas to other crimes, two to run concurrent, one consecutively: a total of 25 years to serve. He testified as a witness for the State. He had no prior felony convictions. He had previously been charged with possession of a deadly weapon, assault, and possession of stolen property, and convicted of a misdemeanor, for which he served some time in jail.

On cross-examination Fields admitted to drinking on the way to Collins. The others smoked some marijuana. He said he stood by the front left tire of the patrol car while the scuffling was going on, and never touched Langham. He also testified that when he was questioned by an officer if Johnson did not pull the knife from his pocket he had answered "yes." He admitted he had forgotten

to tell the officers about Johnson removing the sweater until some time later, and when he did recall the incident he told his lawyer.

He said the first time he saw the butcher knife was when the officer put it on top of the patrol car. Until then he was unaware Johnson had a knife. He also admitted telling the officers Johnson had a coat on, but said Johnson had the coat on after Montgomery gave it to him.

For purposes of clarity in this opinion, we have given the testimony of Fields first, although he was the last person who testified in the case in chief for the State. We relate the remainder of the facts as told by the State's witnesses.

Andy Wade, a 12- or 13-year-old boy, was riding North on the highway and noticed passing a patrol car parked behind a yellow car, and a patrolman apparently searching the back seat area of the yellow car.

Andy Cochran and his niece, Mrs. Brenda Townsend Watson, wife of a highway patrolman, were two of the occupants of a car traveling South on the highway. They noticed the blue lights on the patrol car, slowed down, and observed the yellow Ford parked in front of the patrol car. They also observed three black men tussling with the patrolman. They saw the officer break away, and being grabbed by the three men. They observed the officer's arm being held behind his back, and blood between his shoulders running down his shirt. Three men were involved in the tussling. Mrs. Watson saw the officer being pushed down the embankment. They proceeded South to a place where they could cross into the Northbound lane of the highway, observing the affray as best they could. By the time they had turned around and got back to the scene, the yellow Ford had driven off. Cochran identified the yellow car as a Ford LTD. Cochran briefly examined the slain officer, and took off after the yellow Ford. They saw a deputy sheriff and reported

what had transpired. Neither Cochran nor Mrs. Watson was able to identify any of the individuals involved in the trouble. Mrs. Watson testified she did not see any person making an attempt to help the officer, or any person merely standing around, doing nothing.

Charles Dodds was driving North on the highway. As he approached the scene, he noticed at least three men pushing and shoving the patrolman between the cars and the right-hand ditch. At very first glance they appeared playful. He noticed one man with his arms around the patrolman. Dodds parked his car 60-75 yards from the scene. He noticed the patrolman either being pushed, or breaking away towards the ditch. He could not tell whether the scuffle was beside or in front of the patrol car. He noticed the patrolman taking about two steps towards the ditch as though trying to regain his balance. Either his back or side was to the men, and just as he finished his second step, another man, standing to the left of the man holding the officer, shot him.

Dodds reached and got his own gun and loaded it. By the time he raised up all but one of the men had got into the yellow car He saw the last man getting in on the right hand side.

On cross-examination Dodds testified that at one time it appeared the men were almost in a straight row. He noticed one of the men was huskier than the others, and he observed this man holding the officer. Johnson was not husky. Dodds did not observe any of the blacks standing around doing nothing.

Charles Hollingsworth, a first lieutenant in the Army, a graduate in criminal justice from Mississippi Southern University, and a former police officer in Hattiesburg, was traveling North on the highway when he first observed at least two people at the right rear of the Ford fighting with the patrolman. It seemed to him one person was holding the patrolman and two more were hitting him.

He stopped his car some thirty to thirty-five feet from the Ford and continued to watch. He was about to get out of his car when he heard a shot. There was no fighting going on when he heard the shot. He saw no weapon. Just before the shot was fired, it appeared the patrolman had been pushed back five or ten feet from the others. When Hollingsworth heard the shot, he dropped to his car floorboard.

When he raised up he observed men getting into the Ford. He could only identify Anthony Fields. His testimony as to what he observed Fields doing is ambiguous. On cross-examination he testified as follows:

Q. Coming down 49 you saw what appeared to be a scuffle, is that right?

A. There was a fight going on, yes, sir, it was.

Q. And you have said previously that there were at least two people involved, is that right?

A. That is correct.

Q. You also said that there could have been more people involved, is that right?

A. That is correct.

Q. Did you see those people?

A. I saw at least two people.

Q. Did you see more than two people?

A. There could have been more than two people.

Q. Did you see any more people?

A. I at least saw two in the view that I had from my car.

Q. Didn't see anyone else other than those two, is that right?

A. They were the two I saw intially, that's correct.

• • • •

Q. Did you tell Wade Parham in a telephone conversation that there could have been someone in the car?

A. I could have possibly said that. I don't remember saying it.

Q. But you're not denying it, is that correct?

A. I'd have to look at my testimony on my original statement.

Q. I hand you a copy of your transcript of the telephone conversation. I'd like to call your attention to—Mr. Parham asked you the question: "Did you see more than two blacks, Mr. Hollingsworth? And you said, "There were probably more than two but, you know, I only noticed two. There could have been more out of the car and there could have been one guy that was still driving? Did you say that?

A. It's in the statement. I guess I did say it.

Q. Thank you sir. When you first saw those people if there was a scuffle, the scuffle had already —if there was a stabbing that stabbing would have already taken place, is that right?

A. I cannot answer that.

Q. Did you see anyone stab the Highway Patrolman?

A. No, I did not.

Q. Did you notice whether the Highway Patrolman was hurt?

A. At what point in time?

Q. When you first saw him?

A. When I originally saw him I could not tell.

Q. Did you see anyone stab the Highway Patrolman?

A. No, I did not.

Q. Did you see anyone shoot the Highway Patrolman?

A. No, I did not.

Q. But you heard the shot, didn't you?

A. Yes, I did.

Q. Okay. Backing up just a short piece in time, when you stopped after you saw the scuffle you saw only two people, correct?

A. That's what I had in my statement, yes.

Q. Had there been more people out there they could have already gotten back in the car, is that correct?

A. That is a possibility.

Q. Okay. And you were able to identify one of those two people weren't you?

A. Yes, I did.

Q. Tell the people of the Jury who that man was?

A. I do not recall what his name was.

Q. Was it Anthony Fields?

A. I believe it was.

Q. Are you not certain?

A. I know I identified him; I don't remember what his name was.

Q. Would you like me to help you with your statement? It was Anthony Fields, wasn't it, and you identified him?

A. Yes, it was.

Q. He's the man that turned State's evidence, is that correct?

A. I believe so.

Q. You said he was a big one, he was husky, correct?

A. I believe I said that, yes.

Q. And you saw two people and then you heard the shot, is that right?

A. That's correct.

Q. Was Mr. Fields trying to help that police officer?

A. I don't know.

Q. He was fighting with that police officer, wasn't he?

A. He was one of the men I identified. I could not tell.

Q. You told the District Attorney's office that they were fighting with that police officer, didn't you?

A. Yes, I did.

Q. You did? So he was fighting with him, wasn't he?

A. I don't know if Mr. Fields was fighting with him, but I know—

Q. [INTERRUPTING] What about the two men you saw, were they fighting or just—

BY MR. EVANS:

If the Court please, I request that he be allowed to finish his answer before he asks another question.

BY THE COURT:

Yes. Let him finish his answer and then you may ask another question.

BY MR. DIAZ:

I beg the Court's indulgence.

A. Would you repeat the question, please?

Q. In your previous statement you said that you saw two black men, is that right?

A. That's correct.

Q. And you told in your statement that those two men were fighting with the Highway Patrolman? Is that correct?

A. That's correct.

Q. And you identified one of those two men as Anthony Fields, didn't you?

A. I identified one of the men that I could recognize as Anthony Fields, that's correct.

Q. He was one of the men fighting with the Highway Patrolman, wasn't he?

A. He could have been, yes.

Q. Okay. The man sitting right over there in the green suit, is he the other man?

A. I don't know.

Q. Take a good look at him.

A. I said I don't know. This all happened in a matter of some ten or fifteen seconds.

Q. Okay. To be certain that there's no confusion, this is not the man you identified, is it?

A. No, it is not.

Q. The man you identified was heavy-set and known to be Anthony Fields, correct?

A. That is correct.

[Vol. VIII, pp. 1319-1324]

Bennie Sasser was the final disinterested eyewitness for the State. He was a resident of Covington County, and traveling North on the highway. As he approached the parked vehicles, he noticed something unusual. He observed the patrolman jerk his arm up suddenly and that he was being hit in the back. He then testified [Vol. VIII, pp. 1326-27]:

> There were three, possibly four black men standing out there, and one black man was shorter and heavier-set that was doing the hitting in the back of the Patrolman. Then I observed the Patrolman got away from them, was pushed or something and he ran down the embankment, and about this time I was having to dodge a pickup that was in front of me, and I looked back and he was running back toward them. And as I swerved back around then I noticed that they were getting in their car, the car doors were open, and that's the last time I saw them . . . .

On cross-examination he testified that the husky man he observed hitting the officer in the back was not Johnson. He said it was possible that the man hitting the officer in the back could have been stabbing him.

The postmortem by Thomas Glen Puckett, Hattiesburg pathologist, revealed three wounds: a cut to the bone over the left eye and cheekbone; a 2-2½ inch long, 7-8 inch deep stab wound in the back below the shoulder blades extending into the lung cavity; and a stellate entrance gunshot wound about the level of the left eyebrow. This type of wound was indicative of a weapon

being fired at such close range that the gases from the discharging weapon also entered the victim. Langham's right eye was bulged out markedly as a result of gas from the weapon. The bullet traveled through the brain and lodged between the right rear exterior of the brain and skull.

The doctor testified that Langham was killed by the gunshot wound. He further testified that the stab wound, while serious, might not have been fatal, particularly if Langham could have received reasonably prompt medical attention; but on the other hand could have resulted in death within ten minutes.

Ballistics tests revealed the bullet removed from Langham's skull was fired by his own .357 caliber magnum revolver. This revolver and the butcher knife were found at the scene of the slaying. No fingerprints were recovered from either weapon. also, tests for powder residue from a discharged firearm were negative as to all four: Johnson, Montgomery, Fairley and Fields.

Following their arrest Johnson was observed as having a bad cut on his right palm, for which he received medical treatment.

Tests showed the bloodstains on the knife were Langham's. Also, bloodstains on various parts of the exterior of the yellow Ford were determined to be Langham's. Other stains were found to be blood, but the expert was unable to identify the precise type.

The sweater, which Fields called brown, and identified by all witnesses at trial as being white, was found by Lawrence Anderson, assistant chief of police of Collins, just off the railroad tracks in the area where Fields testified it had been thrown. Tests showed the bloodstains on the body of the sweater came from Langham, and bloodstains on the sleeve came from Johnson.

On clothing identified as belonging to Montgomery tests showed bloodstains of Langham.

No bloodstains were found on Fields's clothing.

Bloodstains were found on Fairley's clothing but not identified.

All the bloodstains on Johnson's clothing were of his own type.

Joe E. Andrews, Jr., an expert on hair and fiber identification employed by the Mississippi Crime Lab, testified there are three basic fibers: animal, plant and synthetic. From his examination of Johnson's clothing, he found gold synthetic fibers with the same characteristics as found on the sweater. Also, from an examination of Montgomery's clothing, he found gold synthetic fibers with the same characteristics as on the sweater. It is not clear from the record whether these fibers found on the sweater and Johnson's and Montgomery's clothing were part of the fabric of the sweater, or simply fibers that had become attached to the sweater. On cross-examination Andrews conceded it was possible that all three of these gold synthetic fibers could have come from some common source other than the sweater.

No such fibers were found on either Fairley's or Field's clothing, nor on Langham's clothing.

Johnson did not testify. The only eyewitness testifying in Johnson's behalf was Fairley, who gave an entirely different version of the affray.

Fairley testified that after Johnson stopped the car, Langham came over to the driver's side of the car and asked Johnson if he had a driver's license, and when Johnson replied "no," the officer told him to step to the back. He said the officer then came around to the passenger's side and asked Montgomery to get out, and step to the back of the car, following which the officer began searching the front passenger seat. After searching the front of the car, the officer told Fairley and Fields to get out of the car. He testified the officer did not find a

butcher knife on the front seat of the car, and did not put a knife on top of the patrol car.

He said the officer told them to "stand to the back." (Vol. XI, p. 1889) Further, he stood at the front end of the patrol car, and the other three were there standing along the side, by the front of the patrol car.

Fairley said the officer had begun to search the back seat of the car and Fields walked up and stabbed him, and that the first time he ever saw the knife or had any knowledge of it was when Fields stabbed the officer.

Fairley said Johnson then ran up and grabbed for Fields, he guessed, and got cut, and that he then ran to the car. He testified that Johnson screamed and cursed that he had got cut. Fairley said Montgomery came to the car next, and seconds later after Johnson got cut, he came to the car, also. He said Johnson tried to crank the car up and it wouldn't get started at first, but finally started, and then they heard a shot and Fields came to the car. Fairley said Fields had a white sweater on.

He did not know whether Johnson got the knife away from Fields or not, but the struggle lasted only seconds.

On direct examination Fairley testified he had been convicted of murder two times (apparently the last time was a conviction for Langham's murder), and twice for assaults, one with, and the other without malice.

On state cross-examination Fairley was asked the purpose of the trip to Collins, and the trial judge sustained the objection to this question.

Further, on cross-examination he testified when the officer was stabbed "we ran up to help the officer and that's when the struggle started. I ran to the car. He said his intention was to grab Fields and when Johnson screamed he ran to the car. He did not relate Montgomery as participating in the affray in any way, but when he ran back to the car Montgomery was there, also.

He said Fields held the officer, stabbed him and scared off the other three all by himself. And, Fields got in the car by the time Johnson got it started.

Further, on cross-examination Fairley said Fields gave Johnson directions to drive the yellow Ford, and they ended up down by the co-op and railroad track. He then testified Fields ran into the yellow Comet, and at this time Johnson and Montgomery were down the street. Fields got in the Comet and Fairley got in and they drove off to Johnson and Montgomery, who then got in. Fields drove just a short distance and said he was too nervous to drive, and asked Johnson to drive. He testified Johnson, with his hand bleeding, got out of the back seat and got in the front seat and started driving.

As to the white sweater which Fairley testified Fields was wearing, he said while they were on the tracks he asked Johnson and Montgomery to help him pull the sweater off. He could not remember how they pulled it off.

He said the reason the three of them did not grab Fields and overpower him was they were afraid, or had panicked.

He admitted that he had told his sister Rosa McCullen that Johnson stabbed the officer and Montgomery had shot him.

Dr. William Munn testified to treating two lacerations at the base of the thumb and little finger of Johnson's right hand, which had almost stopped bleeding at the time he was treating Johnson. Neither wound involved muscles or tendons. The doctor recalled stitches were put in one or the other of the wounds.

There were four jail house witnesses, two who testified for the defense, and two in rebuttal for the state. James Jenkins and Carl Lee testified that while they were in the Simpson County Jail they heard Fields admit to

Fairley he had lied to save himself from going to the gas chamber.

Norman Shelly in rebuttal testified he heard Fairley and Johnson talk about Fairley taking the knife and Johnson stabbing the patrolman. Danny Russell in rebuttal testified Johnson asked him to say that Fields had lied and tricked the state.

PART A.

LAW

GUILT/INNOCENCE PHASE

I.

WEIGHT OF THE EVIDENCE

Johnson's first contention is that the verdict of the jury is against the overwhelming weight of the evidence. Fields testified Johnson stabbed Langham and told Montgomery to shoot, drove the get away car, and led the group. Only Fairley disputed this, and he admitted that he had told his sister Johnson stabbed the officer and Montgomery shot him. The credibility of these witnesses was for the jury. Disinterested eyewitnesses, who saw varying brief time frames of the affray, were not able to specifically identify Johnson as doing anything to the officer during their respective moments of observation, and two recalled Fields under circumstances which would indicate he may very well have been more than an idle spectator, as he testified. There again, it was for the jury to accept the portions of Fields's and Fairley's testimony they wished to believe or discredit. This Court has long held, as stated in *Cochran v. State*, 278 So.2d 451 (Miss. 1973), citing *Wilson v. State*, 264 So.2d 828 (Miss. 1972):

> In a criminal prosecution, the jury may accept testimony of some witnesses and reject that of others, it may accept in part and reject in part the testi-

mony of any witness, or it may believe part of the evidence on behalf of the State and part of that for the accused. In other words, the credibility of witnesses is not for the reviewing court. *Bond v. State*, 249 Miss. 352, 162 So.2d 510 (1964).

It was the function of the jury to pass upon the credibility of the witnesses and to resolve the issues. Since there was ample evidence, which if believed by the jury, justified the verdict, the verdict will not be disturbed on appeal. *Murphree v. State*, 228 So.2d 599 (Miss.1969). (264 So.2d at 830). [Other citations omitted]

See also: *Dickerson v. State*, 441 So.2d 536 (Miss. 1983) at 538, citing *Gandy v. State*, 438 So.2d 279, 285 (Miss.1983); *Pearson v. State*, 428 So.2d 1361, 1364 (Miss.1983); and *Gathright v. State*, 380 So.2d 1276, 1278 (Miss.1980).

Significant is the testimony that both Johnson's and Langham's bloodstains were found on the sweater. Langham's bloodstains were found on Montgomery's clothing, and unidentified bloodstains were found on Fairley's clothing, but no bloodstains were found on Fields's clothing. Also, synthetic fibers from a common source were found on the sweater, Johnson's clothing and Montgomery's clothing. None was found on Fields's clothing.

The evidence for the jury was not limited to the co-indictee Fields. His testimony was corroborated by the bloodstain and fiber tests. Further, the only witness who directly disputed Fields was Fairley, and from this record his testimony is not convincing. Moreover, Fairley admitted telling his sister that Johnson stabbed, and Montgomery shot the officer. Johnson was indicted for capital murder in the death of a patrolman acting in his official capacity, with knowledge he was a police officer acting in his official capacity, in violation of Miss.Code Ann. § 97-3-19(2)(a).

There was a clear jury issue on Johnson's guilt, and we are not at liberty to disturb it.

II.

IMPROPER CLOSING ARGUMENT

Johnson contends there was prosecutorial misconduct in the closing argument. The district attorney made the opening and rebuttal arguments for the state, Johnson's two trial attorneys each made closing arguments in his behalf.

Prior to the circuit judge instructing the jury, defense counsel asked the court to permit them to delay making objections to closing argument until the state had concluded, and make such objections outside the jury's presence, so as not to interrupt the argument. Defense counsel also warned that they might object, in any event, "if something gets out of hand." The record reveals the following (Vol. XII, p. 1984):

BY MR. HARPER:

And, Your Honor, one other thing too, rather that —I don't know if we are going to want to make objections during the closing. What I'd like to do is, so that we not interrupt, is to ask to reserve our right to make objections until the closing is completed; and outside the presence of the Jury, make our objections at that time. Of course, if something gets out of hand, we will have to object at that point.

BY MR. EVANS:

That's very considerate of you. Thank you.

BY THE COURT:

Okay.

In the state's opening argument, the district attorney made the following statement (Vol. XII, p. 2058):

> . . . Samuel Johnson wanted to be the judge and the jury that day. He wanted to return the verdict and then he wanted to return the sentence, but today is a different day. Today is the day I've waited for a long time because besides being an officer, Billy was a friend. Today is the day that Samuel Johnson is going to answer to twelve jurors for his crime. Today is the day and y'all are the twelve.

When defense counsel Harper had concluded his argument, he made the following objection to the opening argument of the district attorney (Vol. XII, p. 2068):

> BY MR. HARPER:
>
> Your Honor, at this time the Defendant would object to Mr. Evans' statements concerning his personal relationship with the Deceased, stating that he was a personal friend of his. There is nothing of that into evidence at all before this Jury, and we also move for a mistrial on that basis. It improperly prejudices the Jury.
>
> BY THE COURT:
>
> Let the record be noted and I will caution Mr. Evans in the future.
>
> BY MR. HARPER:
>
> And my motion for a mistrial, then, is overruled?
>
> BY THE COURT:
>
> Overruled. Let the Jury come in, please.

No objections to the district attorney's argument were made until he concluded. Among his remarks objected to were the following [his rebuttal concluded (Vol. XII, p. 2125)]:

> . . . Like I said a minute ago, I pray to God that he gives you the wisdom to see through this and to see Samuel Johnson for the murderer he is because there

> ain't nothing else I can do but pray about it now. If he does give you that wisdom and if he gives you that strength of conviction and if he gives you that courage, you're going to find this man guilty of capital murder. Thank you.

The district attorney opened his rebuttal argument with the following comment (Vol. XII, p. 2112):

> I've been a lawyer since 1975, which ain't a long time to a lot of folks, I guess, but since then I've tried an average of one case a week, which makes a little better than three hundred cases. I'm going to tell y'all and everybody here and Mr. Diaz that I have never heard such blatant, arrogant disregard for the truth and patronizing tones that I've just heard from what you call a closing argument, and I'm not going to dignify the majority of it with an answer, . . .

At the conclusion of the district attorney's argument, defense counsel made the following objections, followed by a motion for a mistrial, which was overruled (Vol. XII, p. 2127-2129):

> BY MR. DIAZ:
>
> Your Honor, we have three objections to Mr. Evans' closing argument, the first being that he made a personal comment, "Pray to God," based on personal belief. It violates, Your Honor, the Fourteenth Amendment and the Eighth Amendment.
>
> Your Honor, the second reason is personal attacks on myself. He called me a liar. It violates my Eighth Amendment, Fourteenth Amendment, and Mr. Johnson's Sixth Amendment.
>
> I also object to him making the comment that Mr. Johnson didn't want to go back to jail, and I would like to move for a mistrial.

BY THE COURT:

Let the motion for a mistrial be overruled and let the record show that this was at the conclusion of the case, and the attorneys agreed that they would not make objections during the argument and it kind of binds the hands of the Court.

BY MR. ROBERTS:

I want to make a statement into the record too. I think that Mr. Evans' conduct was extremely commendable considering Mr. Diaz's comments from the Bible, which counteracts Mr. Evans' "Pray to God," and also Mr. Diaz' [sic] comments about cheap tricks imposed by the District Attorney. I want that in the record.

BY THE COURT:

Of course, the full record is—

BY MR. ROBERTS:

Yes, sir.

BY THE COURT:

—in the record.

BY MR. ROBERTS:

Yes, sir, I just want to make those comments too.

BY THE COURT:

Yes, sir.

BY MR DIAZ:

Thank you, Your Honor.

Trial was held from August 30 through September 3, 1982.

On October 11, 1982, Johnson's trial counsel filed a nine-page motion for a new trial, assigning twenty-nine

reasons why it should be sustained. The fifteenth assignment reads as follows (Vol. XIII, p. 2308):

> 15. The closing argument of the District Attorney in the guilt/innocence phase of Petitioner's trial, was inflammatory, included statements unsupported in the record, and contained a personal attack against Petitioner's trial counsel. The District Attorney accused defense counsel of fabricating evidence on Petitioner's behalf. The argument, in its entirety, was extremely prejudicial to Petitioner and violated his constitutional rights to due process and a fair trial as guaranteed by the laws and Constitution of the State of Mississippi and the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

On October 12, 1982, the circuit judge entered an order relieving the trial counsel Gerald Diaz, Jr., and Gregory Harper, and appointing Kenneth J. Rose to represent Johnson on appeal and in future proceedings. This attorney filed a supplemental motion for a new trial on August 29, 1983, assigned seven additional grounds for a new trial, making no mention of the district attorneys argument. Thereafter, on August 31, 1983, counsel filed a second amended motion for a new trial assigning two additional grounds, one of which pertained to the district attorney's argument (Vol. XIV, pp. 2511-2512):

> During the closing argument, the prosecutor connected the evidence of Otis Lee Fairley's prior trial and conviction to Samuel Johnson's case. "This case has been in my office since December the 31st, 1981. I've tried similar cases, two other similar cases, and it's a good thing they didn't ask me what I saw; because I see right now what you do, a murderer. Thats [sic] all. . . . I see a man fighting for his life against the likes of Charles Montgomery and Otis Fairley and Samuel Johnson, convicted murderers . . . I've tried two other cases just like this and I've

seen what they've tried to do two times before this and I've seen what they've got away with and I see it here and it makes me mad and there ain't nothing I can do about it but pray to God that y'all see through it." (T. Trial at 1622, 1626, 1627). There was no evidence presented of prior murder convictions of Samuel Johnson or Charles Montgomery.

On his appeal, Johnson's counsel has found further statements objectionable.

We must first observe that the state and defense counsel should be given wide latitude in their arguments to a jury. This is inherent in, and indispensable to, our adversary system. Courts should be very careful in limiting the free play of ideas, imagery and the personalities of counsel in their argument to a jury.

We next observe it is the duty of a trial counsel, if he deems opposing counsel overstepping the wide range of authorized argument, to promptly make objections and insist upon a ruling by the trial court. The trial judge first determines if the objection should be sustained or overruled. If the argument is improper, and the objection is sustained, it is the further duty of trial counsel to move for a mistrial. The circuit judge is in the best position to weigh the consequences of the objectionable argument, and unless serious and irreparable damage has been done, admonish the jury then and there to disregard the improper comment. See: *Wilson v. State*, 234 So.2d 303 (Miss.1970) at 308; *Aldridge v. State*, 180 Miss. 452, 177 So. 765 (1938) at 456; *Matthews v. State*, 148 Miss. 696, 114 So. 816 (1927) at 701.

Defense counsel chose not to follow this familiar path, but to wait until the conclusion of the argument to object. This is quite illogical and extreme, and places the state in a "Catch 22" situation. To allow defense counsel to argue at conclusion of argument, to which no objection has been made, he is then entitled to a mistrial

is not only inviting error, but also preventing the trial judge from taking the one step he could have taken to remove the possibility of prejudice. We cannot countenance assigned errors based on this sort of a proceeding.

There was not a single statement made by the district attorney, which, even if there were impropriety, could not have been immediately corrected by an objection being sustained, and an admonishment by the court.

Moreover, we have studied the entire argument of the prosecuting attorney. He perhaps made statements he should not have, strong. He was not complimentary of defense counsel. Neither was defense counsel complimentary of the district attorney. It is a common tactic, in one way or another, to diminish your adversary's case by reflections on his attorney. If it becomes too blatant, an objection should be sustained.

The complaint of the prosecution's argument include calling upon the Deity, making reference to the personal friendship of the district attorney and the victim, personal remarks directed to defense counsel, personal belief in Johnson's guilt, and frustration in prosecuting these cases. Every one of these complaints could have been quickly dissipated by a contemporaneous objection and ruling by the circuit judge.

Moreover, no appellate court would be warranted in reversing this case on the basis of the argument made by the district attorney.

III.

REFUSAL OF A CONTINUANCE

Johnson was indicted January 18, 1982. On March 1, 1982, the circuit judge entered an order specially setting the cause for trial July 13, 1982, in the Circuit Court of Covington County. On June 3, 1982, Johnson made a motion for a change of venue. On June 21,

1982, the circuit judge entered an order sustaining the motion, transferring the cause to Pike County, and setting the cause for trial August 30, 1982.

The record in this case reveals thorough and aggressive defense counsel. At least thirty pre-trial motions of one kind or another were made.

Inexplicably, defense counsel waited until August 30, 1982, to file a motion for a continuance on the ground two witnesses purported to be "forensic scientists" would be "out of the country" for the week beginning August 30. The motion further stated these witnesses had viewed all the evidence and prepared extensively from a "scientific point of view," and would be called as witnesses in the defendant's case in chief. Johnson filed no affidavit with the motion. Defense counsel Diaz attached an affidavit to postpone the trial thirty days in order to study the trial transcripts of trials of Montgomery and Fairley, which stated nothing, however, about the absent witnesses.

On August 18 there was a colloquy with the court about these witnesses, the circuit judge stated he had no knowledge as to what they would testify, and got a general answer they were experts and would help defense counsel try the case.

This motion contained almost none of the essential ingredients we have consistently required under Miss. Code Ann., § 99-15-29 (1972) to justify a continuance of a cause. It was also contemptuous of the obligation every trial counsel owes a court to wait until ten days before the pre-determined trial date to inform the circuit judge of the unavailability of these two witnesses, as shown by the facts in this particular case.

This assignment of error is frivolous.

IV.

LIMITATION OF CROSS EXAMINATION OF FIELDS

Prior to his death, Patrolman Langham had killed a black man. The state made a motion in limine to prevent Fields from testifying to this fact, which the circuit judge sustained. (Vol. V, p. 775)

The mere fact Langham had previously killed a black man in and of itself had no relevancy to this case. In order to make evidence of this fact competent in this case it was incumbent on the defense to in some manner demonstrate its relevancy.

No attempt was made to do so either before or during trial. It was not error, therefore, for the court to sustain the motion.

In Johnson's hearing on his motion for a new trial, conducted September 18, 1983, approximately one year following his trial, the circuit judge was presented with the following affidavit executed by Fairely on September 15, 1983 (Vol. XIV, p. 2520):

> Before me the undersigned authority personally appeared Otis Lee Fairley who after being duly sworn deposes and says:
>
> My name is Otis Lee Fairley. I grew up in Covington County. Anthony Fields is my first cousin, my father and his mother are brother and sister. Anthony Field's mother has lived for the last several years in Collins, Covington County, Mississippi.
>
> At Samuel Johnson's trial, I was not allowed to testify to a conversation between Anthony Fields and I in the Simpson County Jail in January, 1982, at which time he told me that the Highway Patrolman, Billy Langham, had murdered a black person in Jeff Davis County Ten (10) months before we were stopped. I asked Anthony Fields why he had to kill the Highway Patrolman instead of just coming to

> the car. He told me that he knew the Highway Patrolman had murdered a black person and that if he let him go he thought the Highway Patrolman would go for his gun and kill us before we could leave.

On appeal Johnson argues he was prevented from introducing the *statement* allegedly made by Fields to Fairley as to why he, Fields, shot Langham. No such attempt to introduce such statement was ever made, by asking either Fields or Fairley if it was made. Had defense counsel done so, we would have an entirely different question on competency.

In looking at this record, we could not believe the state would have objected to the admissibility of this statement for either evidentiary or strategic reasons. The concluding sentence of this affidavit as a reason for killing Langham is nonsensical.

It is worth noting that during trial Fairley was given the opportunity on cross-examination to answer why Fields would have shot Langham, but only stated: "He knew all the officers from Covington County." (Vol. XI, p. 1908) There is no merit to this contention.

V.

INSTRUCTION ON CAPITAL MURDER

Johnson argues the court's instruction failed to embrace the statutory requirements of murder and capital murder, and also to require the state to prove intent on his part to commit murder. See: Miss. Code Ann. § 97-3-19(1)(a), and (2)(a).

Instruction C-7 reads in pertinent part (Vol. XII, pp. 1989-1990):

> The defendant, Samuel Johnson, has been charged by an indictment with the crime of capital murder for having wilfully, unlawfully, feloniously, of his malice aforethought and without authority of law kill

> and murder Billy Morris Langham, a human being, and that the said Billy Morris Langham was a peace officer at the time of the alleged murder, and that at the time of the alleged murder, Billy Morris Langham was acting in his official capacity as a peace officer, and that at the time of the alleged murder the defendant, Samuel Johnson, knew that Billy Morris Langham was a peace officer acting in his official capacity.
>
> If you find from the evidence in this case beyond a reasonabely [sic] doubt that:
>
> 1) The defendant, Samuel Johnson, aided and commanded Charles Montgomery to commit capital murder by stabbing Officer Billy Morris Langham with a knife and ordering Charles Montgomery to shoot Officer Billy Morris Langham; and
>
> 2) That Charles Montgomery wilfully, unlawfully, feloniously and of his malice aforethought and without authority of law kill and murder Billy Morris Langham a human being, by shooting said Billy Morris Langham with a .357 Magnum pistol; and
>
> 3) That Billy Morris Langham was a peace officer, to-wit: a member of the personnel of the Mississippi Highway Patrol; and
>
> 4) That Billy Morris Langham was acting in his official capacity as a peace officer at the time of his death; and
>
> 5) That the defendant, Samuel Johnson, then and there had knowledge and knew that the aforesaid Billy Morris Langham was acting in his official capacity as a peace officer aforesaid; and
>
> 6) That said killing and murder of Billy Morris Langham occurred on the 31st day of December, 1981 in Covington County, Mississippi.

then you should find the defendant, Samuel Johnson, guilty of capital murder, and the form of your verdict may be:

> "We, the jury, find the defendant, Samuel Johnson, guilty of capital murder."

If you find the State has failed to prove any one of the essential elements of the crime of capital murder, you must find the defendant not guilty of capital murder and you will proceed with your deliberations to decide whether the State has proved beyond a reasonable doubt all the elements of the lesser crime of murder less than capital.

It can be readily observed that the first part of C-7 requires intent on the part of Johnson to kill Langham, and knowledge that he was killing a peace officer acting in his official capacity. The following paragraph with its six sub-parts clearly define the acts necessary to come within the capital murder framework. The jury could not have been misled by this instruction. It was never the contention of Johnson, either in the circuit court or on appeal, that the slaying of Langham was not a capital murder. His defense was he had nothing to do with the slaying. We do not have the situation of two parties engaged in a felony, and one without the actual knowledge or consent of the other committing a murder, also. The authorities cited by Johnson are inappropriate.

Moreover, defense counsel approved these instructions by the circuit court. *Williams v. State*, 445 So.2d 798 (Miss.1984) at 807; *Rayburn v. State*, 312 So.2d 454 (Miss.1975) at 455; Rule 42 Miss.Sup.Ct. Rules.[1]

[1] The state's only answer to this assignment of error in its brief was that it was waived. We have also addressed the assignment on its merits.

While the state is correct the point was waived, we think a word of caution is in order. When the state fails to answer an assignment of error on the merits, and rests its case with the contention

VI.

EVIDENCE OF PLEA AND SENTENCE OF STATE'S WITNESS

During the state's questioning of Fields, it was brought out that he pleaded guilty and had been sentenced to twenty-five years for his part in this crime. In closing argument the district attorney argued that it was necessary to do this to bring the parties responsible for the officer's death to justice.

The language of this Court in *Buckley v. State*, 223 So. 2d 524 (Miss.1969), under unusual facts has been the basis for numerous assignments of error. It is time we distinguish *Buckley* from the usual case.

Let us take the ordinary case in which two or more people are charged with the commission of a crime, and it is necessary that one of the participants in the crime testify for the state in order to make out a case against any of them. Frequently, the state will choose the person whose participation is not as great, or whose guilt is not as reprehensible, or who has readily confessed. Generally speaking, there are good, and at times compelling reasons for the state's choice among those accused to be the witness for the state.

It is not the function of the court, however, to tell the state which witness among the accused persons to select as the witness for the state. It is the right of the state to select which witnesses it deems proper to testify on its behalf.

While it is the sole responsibility of the circuit judge to sentence each accused who has been convicted or pleaded guilty, it is not improper for a circuit judge to take into consideration in his sentencing that such per-

the point has been waived, it places itself in some jeopardy. We do not know whether in so doing the state is conceding that if the point in fact was not waived, it is meritorious.

son is cooperating with, and will be a witness for the state in the prosecution of other defendants.

A co-conspirator, co-defendant or co-indictee who has been thus favored, however, is a marked man before the jury. There is a big question mark placed upon his testimony by the law, and indeed the accused on trial is entitled to an instruction that his testimony is to be viewed with caution.

One of the best weapons for defense counsel to further arouse the distrust of the jury in the testimony of such witness is to ask him on cross-examination, whether he has been sentenced or not for his participation, and if so, the sentence he has received. Invariably, if he has been sentenced, it will be much lighter than the sentence the man on trial can receive and, if he has not been sentenced, defense counsel can exploit even more the weakness and untrustworthiness of the testimony from such a witness.

These observations are to point out that in the ordinary case, if the state did not on direct have such witness testify as to his plea of guilty and sentence, defense counsel on cross-examination most assuredly would. Indeed, defense counsel would be derelict in his duty to his client not to point this out to the jury, so as to show a very special interest the witness has in his own testimony.

In closing argument, defense counsel has no better weapon to demonstrate the weaknesses of such testimony, the disparity of the sentence received by the state's witness, and the sentence which the court can inflict upon his client. Indeed, even though the state brings out on direct examination the plea of guilty, defense counsel invariably will further exacerbate the state's problem on cross-examination of such witness and hammer away at the disparity in treatment in final argument.

What harm has resulted, then, by the state making this concession in its examination in chief?

In the ordinary case, none.

Buckley presented a special set of facts. Buckley and one Billy Roy Pitts were indicted for kidnapping. At Buckley's first trial, Pitts testified as a witness for Buckley, corroborating Buckley's testimony. This trial ended in a mistrial when the jury failed to reach a verdict. Prior to the second trial, Pitts pleaded guilty to the charge, and at Buckley's second trial testified as a witness for the state. His testimony in the second trial corroborated the testimony of the kidnap victim, and contradicted Buckley's.

Over the objection of Buckley, the state was permitted to prove Pitts had pleaded guilty and then sentenced to serve five years. We found this to be reversible error there because proof of the plea of guilty *over Buckley's objection* had the effect of bolstering the testimony of an admitted perjurer. We stated:

> Appellant assigns as error the action of the trial court in overruling his objection to that part of the testimony of Pitts wherein he testified that he had been jointly indicted on the charge of Kidnapping Jack Watkins and that he had plead guilty to that charge, and as a result of his plea of guilty, had been sentenced to serve a term of five years in the state penitentiary. The overruling of this objection and admission of this testimony was reversible error. The law is well settled in this state that where two or more persons are jointly indicted for the same offense but are separately tried, a judgment of conviction against one of them is not competent evidence on the trial of the other because such plea of guilty or conviction is no evidence of the guilt of the party being tried. *State v. Thornhill*, 251 Miss. 718, 171 So.2d 308 (1965); *Pieper v. State*, 242 Miss. 49, 134 So.2d 157 (1961); *Pickens v. State*, 129 Miss. 191, 91 So. 906 (1922). Not only was this testimony designed to lead the jury to believe that since Pitts had

> plead guilty to the charge, that his co-indictee, Buckley, was also guilty, but it was also designed to bolster the testimony of Pitts. On the first trial of this case Pitts testified and his testimony in that trial corroborated Buckely's version of what happened. On this trial he testified directly contrary on the crucial issues. The state was aware that the evidence that Pitts had plead guilty to the same charge since the former trial would add weight to his testimony. It had the effect of bolstering the testimony of an admitted perjurer. [223 So.2d at 527-528]

The *Buckley* rationale is not present in this case. Indeed, defense counsel made no objection to the state's elicitation in its direct examination of Fields that he had pleaded guilty and been sentenced for his part in the crime. Defense counsel had excellent reason not to object, this was a fact very much in Johnson's interest with which to acquaint the jury.[2]

We do not overrule *Buckley*, but neither do we extend its holding beyond the unusual situation of that case. If defense counsel under some unusual case wishes to withhold from the jury the fact that a co-indictee testifying for the state has pleaded guilty and received a lesser sentence, he has a duty to object to the testimony offered by the state. This duty is more compelling in a case of this sort than in the usual case in which we have held that failure to object to testimony waives any assignment of error on appeal.

To permit this defendant to say nothing at trial, and complain for the first time in post-trial proceedings presents a classic case of having your cake and eating it, too.

---

[2] It is interesting that in this case one of the pre-trial motions was to require the state to disclose any agreement it had made with any prosecuting witness that would influence his testimony, because such agreement would affect the credibility of the witness, and the "trial jury is entitled to know it." [Vol. II, p. 262]

VII.

REFUSAL OF INSTRUCTION

Johnson complains of the circuit judge's refusal of requested Instruction D-15 (Vol. XII, pp. 2025-2026). This instruction would have authorized the jury to separately consider whether he was guilty or not of the crime of being an accessory after the fact.

No authority is cited in support of this contention, and it is without merit. Johnson was on trial for capital murder, and he was entitled to instructions fully embodying all the elements of this crime, and further that in the absence of proof such elements, he was entitled to an acquittal. He was not entitled, however, to have the jury separately instructed and separately to consider whether or not he was guilty of being an accessory after the fact. See: *Wilcher v. State*, 455 So.2d 727 (Miss. 1984).

SENTENCING PHASE

VIII.

DENIAL OF FUNDS FOR OUT-OF-STATE WITNESSES

The record reveals that on motion by defense counsel, the court awarded expenses to counsel to travel to New York and interview prospective witnesses.

On August 28, 1982, defense counsel filed a motion for compulsory process and attendance fees, as well as travel expenses, for twenty-one prospective witnesses. Attached to the motion is an appendix summarizing the content of their knowledge of Johnson. From the summary of their proposed testimony, it is clear they were character witnesses.

While under the holding of the United States Supreme Court in *Eddings v. Oklahoma*, 455 U.S. 104, 113-115, 102 S.Ct. 869, 876-877, 71 L.Ed.2d 1 (1982), it might

have been proper in the sentencing phase of the trial to have such witnesses testify on Johnson's background, that case is not authority for the proposition that a state is required to furnish travel expenses for out-of-state prospective character witnesses. Moreover, the State of Mississippi is without authority to compel the attendance of out-of-state defense witnesses in a criminal case. See: *Diddlemeyer v. State*, 234 So.2d 292, 295 (Miss.1970). Under Article 3, Section 26 of our Constitution an accused is entitled to compulsory process for witnesses in his favor. The state's only power, however, is to reach witnesses within the state.

In any event, before a circuit judge should be criticized, defense counsel at a minimum, was under a duty to furnish detailed statements in affidavit form from each of these proposed witnesses as to what their testimony would be in the trial of the case. In this case the only thing presented to the circuit judge was a summary by counsel, not sworn to, as to what these witnesses might testify.

IX.

IMPROPER ARGUMENT IN SENTENCING PHASE

In complaining of improper argument of the district attorney during the sentencing phase, Johnson contends the state led the jury to believe if he were sentenced to life, he would eventually be paroled. Pertinent parts of the argument for the state and defense are as follows:

CLOSING ARGUMENT ON BEHALF OF THE STATE

BY MR. EVANS:

> Now, what you're considering is serious business. It's about as serious as it gets in our law and in our lives. And a lot of good-hearted and well-meaning people who don't understand the purpose and the

> necessity of capital punishment will probably say that I'm very cold and harsh and cruel when I stand here and I say that because of having been convicted of second degree assault with intent to commit first degree rape and capital murder that Samuel Johnson should die. . . . [Vol. XIII, p. 2276]
>
> • • • •
>
> This makes the tenth time that I have either tried or prepared for trial a capital murder case, and if Mr. Johnson's lawyers argue like all those others I've been involved in, they'll ask you for mercy, they'll ask you for compassion; and they'll ask you for compassion, if they're like the others and tell you that Samuel Johnson doesn't want to die. Billy didn't want to die either. And if they argue like the others, they'll ask you for mercy and plead for Samuel Johnson's life. Billy plead for his life. But mercy wasn't in the heart of Samuel Johnson last New Year's Eve when he told Charles Montgomery twice to shoot. . . . [Vol. XIII, p. 2277]

CLOSING ARGUMENT ON BEHALF OF THE DEFENDANT

BY MR. HARPER:

> . . . The only thing I'm here to do right now is to ask you to spare his life. And Mr. Evans is right, I am getting up here asking for mercy. I am asking you to spare his life.
>
> I want you to remember what Dr. Fisher said. And on this Instruction, PS-2, that Mr. Evans has referred to, there are several things that you are to consider as mitigating circumstances. I want you to study this instruction when you get back there and I want you to remember what Dr. Fisher said, that he can function in prison with that life sentence and not be violent. [Vol. XIII, pp. 2279-2280]
>
> • • • •

I ask you to study the instruction here and remember those things, and I ask you to think about what it's going to be like if he goes to the gas chamber, what it will be like there, and I ask you to spare his life. [Vol. XIII, p. 2281]

FINAL CLOSING ARGUMENT ON BEHALF OF THE STATE

BY MR. EVANS:

I can tell you what it's like. It's a gray room all the way around about like this and there's a bench in it and under that bench, there is a pail of water and above that are two pills, and the Sheriff pulls the handle that drops those pills into water. Then Sam Johnson will take a deep breath and in five to ten seconds his life will be ended. There will be no pain, there will be no agony, there will be no suffering. He won't feel a knife in his back and he won't feel a bullet exploding in his brain. And that's what it's like.

Dr. Fisher said that Samuel Johnson can adapt to prison life. My first response was that we're not here to see how Sam Johnson will adapt to prison life. What concerns me is what is going to happen the next time he decides to commit a second degree assault with intent to rape and what is going to happen the next time he decides he wants a Highway Patrolman or another law enforcement officer dead. You heard Dr. Fisher's testimony that inside prison his potential for violence was low, but outside, it was high. I just can't get concerned about how he would adapt to prison life when I know that his potential for dangerousness on the outside is high. [Vol. XIII, p. 2282]

• • • •

. . . [W]e have a system that really does work after all. And, as I told you before, I will now, in the name of that system and the decent, law-abiding

people in Mississippi, and by the authority that the ones in the Thirteenth District gave me, I'm going to ask that you retire and come back in a little while and tell Judge Pittman by your verdict, yes, we find that the aggravating circumstances do outweigh the mitigating circumstances we find that a man who commits second degree assault with intent to commit first degree rape and a man who has been returned to the penitentiary again and again and again, spent 10 of the last 18 years in the penitentiary, and a man who has a high potential for hurting other people and a man who has taken an innocent life when he killed an officer while that officer was enforcing the laws of our good people, has chosen himself to forfeit his life in the eyes of God and in the eyes of our law. You are not the one executing Samuel Johnson. Regardless of what they tell you, you're not the one. He chose that himself when he decided to be a criminal in 1963. So, as I said, I now ask you to retire and return shortly and tell Judge Pittman that the aggravating circumstances outweigh the mitigating circumstances and because of that, Samuel Johnson should suffer the penalty of death. [Vol. XIII, p. 2287]

In *Hill v. State*, 432 So.2d 427, p. 439 (Miss.1983); and in *Wiley v. State*, 449 So.2d 756, p. 761 (Miss. 1984), we condemned an argument which intimated to the jury that their decision "was not the last word."

In *Wiley*, we likewise disapproved an argument by the prosecution which stresses that any sentence to life imprisonment inevitably means parole for the convicted person, rather than having to serve his entire life in prison.

It is clear from the argument from the prosecution in this case that the district attorney never reached the type of argument which we condemned in *Hill*, supra, or in *Wiley*, supra. The argument made was in answer to the argument of defense counsel, and was fair argument.

In addition to this, defense counsel made no objection whatever to the argument by the state. As we have stated many times, and again in *Hill*, we are not obligated to review any assignment of error for closing argument in which there was no objection made during the trial.

We have carefully reviewed the entire argument by the state and defense counsel, and we find no reversible error for any statement made by the prosecution.

X.

SENTENCE NOT DISPROPORTIONATE

It is the duty of this Court under Miss.Code Ann § 99-19-105(3)(c) to review the proportionality of every death sentence. We also have this responsibility under decisions of the United States Supreme Court, as well as our own. See: *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); *Billiot v. State*, 454 So.2d 445 (Miss.1984); *Dufour v. State*, 453 So.2d 337 (Miss.1984); and *Neal v. State*, 451 So.2d 743 (Miss.1984).

Under the facts of this case, the jury was warranted in believing Johnson an active participant, if indeed not the leader, in a deliberate, brutal slaying of a peace officer carrying out his duties. In the absence of the abolition of the death penalty, no appellate court is justified in holding that the jury, having found Johnson guilty, could not also return a death penalty verdict under these facts.

The very word "murder" embraces within its meaning cruelty, brutality and an evil intent carried to the ultimate in harm: death. It is redundant to characterize a murder as cruel, brutal or malicious.

Civilized society must place its dependence on peace officers. They preserve the peace, protect us from harm,

and pursue the wrongdoer. They are the front line infantry in society's eternal struggle with crime.

The murder of a police officer in the line of duty must be equated with treason or espionage in time of war. Such a crime warrants the most severe punishment society exacts.[3]

We are not persuaded by Johnson's first argument that his case comes under the proscription of *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). That case involved a defendant who was a participant in a robbery, but who had nothing whatever to do with the slaying of the robbery victims.

Nor, is there any merit to Johnson's second argument that because Fairley and Montgomery in separate capital murder trials received verdicts of life imprisonment from the juries, Johnson could only be sentenced to life. See: *Bullock v. State*, 391 So.2d 601, pp. 612-614 (Miss.1980).

XI.

PRECLUSION OF EVIDENCE OF SENTENCES OF CO-DEFENDANTS

Somewhat more troublesome is Johnson's argument that the circuit judge erred in excluding from consideration by the jury during the sentencing phase that the juries trying Fairley and Montgomery had rendered life sentence verdicts. Clearly, under *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), Johnson was entitled to have his trial jury consider "any relevant circumstance."

Were the life sentences of Fairley and Montgomery *relevant mitigating circumstances?*

---

[3] It follows this case is not disproportionate to the sentences imposed in other capital murder cases. See "Appendix A" for cases considered by this Court in this case.

We must hold they were not. Suppose, for example, the juries which tried Fairley and Montgomery had returned death penalty verdicts? Would the state, under any theory, have been permitted to show this over Johnson's objection? Each case tried by a separate jury must stand on its own. Otherwise, the jury trial is pointless.

Moreover, for the separate sentences of Fairley and Montgomery to have had any meaning in Johnson's, it would have been necessary to develop all the facts of each of their trials for this jury.

Johnson cites two Florida cases, both of which are distinguishable. In *Messer v. State*, 330 So.2d 137 (Fla. 1976), the Florida Supreme Court held the trial court erred in excluding from consideration by the jury during sentencing phase the plea bargained second degree murder sentence received by a co-defendant. As we stated, supra, Johnson in this case was clearly entitled to have the jury know and consider the guilty plea and sentence of Fields. This is quite different from the convictions of Fairley and Montgomery.

Slater v. State, 316 So.2d 539 (Fla.1975), involved a circuit judge overruling a jury recommendation of life imprisonment and imposing the death sentence, a procedure authorized under the Florida statutes. The Florida Supreme Court in turn overruled the circuit judge's imposition of the death sentence, the main reason being that an equally culpable defendant had been authorized to plead *nolo contendere* to first degree murder and received a life sentence.

Thus, it is clear the Florida cases have no application to this case.

XII.

SENTENCING INSTRUCTION PS-2

Johnson's first complaint on this instruction is that it did not provide a "principled basis for distinguishing this

case from the many other murder cases in which the death penalty was not imposed under the statute." His supporting argument is somewhat amorphous, nebulous, which we would be inclined to ignore in a less somber case. As we construe it, he argues that including as an aggravating circumstance his 1963 conviction of assault to commit rape did not channel the sentencing jury's discretion by "clear and objective standards."

We note that Miss.Code Ann. § 99-19-101(5)(b) authorizes the sentencing jury to consider as an aggravating circumstance, "the defendant was previously convicted . . . of a felony involving the use of threat of violence to the person." Contrary to Johnson's assertion, this is a clear and objective standard, fulfilling the guidelines of the United States Supreme Court in *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), and as further stated by *California v. Ramos*, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983); and *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

It is not the purpose of Federal appellate review to deny to the states the authority to and responsibility for determining the aggravating circumstances which justify a death penalty. *Gregg v. Georgia*, supra; *Zant v. Stephens*, supra; *California v. Ramos*, supra; and *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976).

Nor is it the function of this Court to curtail this authority vested in our legislature. We cannot say the legislature had no constitutional authority to include this as an aggravating circumstance in a death penalty case.

Johnson further claims, without citing authority, that the conviction was too remote in time to be considered as an aggravating circumstance. Again, we are not prepared to deny the legislature had the power and lawful authority to include this aggravating circumstance in the

instruction on the facts in this case. We note the circuit judge wisely and humanely permitted Johnson to include in the instruction as a *mitigating circumstance* the remoteness in time of this conviction. Johnson was thus permitted to argue to the jury the point he asserts here, and in this argument he had the approval of the court's own instruction. Cf. *Zant v. Stephens*, supra; *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980).

Nor do we find merit in Johnson's next contention that the record does not support a consideration by the jury as an aggravating circumstance that Johnson committed the murder for the purpose of avoiding arrest.

Finally, he argues the record does not support a jury consideration whether the murder was especially heinous, atrocious and cruel. But, see: *Booker v. State*, 449 So. 2d 209 at 220-221 (Miss.1984); *Caldwell v. State*, 443 So.2d 806 (Miss.1983) at 814-815; and *Irving v. State*, 441 So.2d 846 (Miss.1983) at 849-850.

JOHNSON'S SUPPLEMENTAL BRIEF

Johnson filed a supplemental brief containing seven additional assignments of error.

XIII.

WAS THERE A DISCOVERY VIOLATION?

Simpson County Jail inmate Norman Shelly was called by the state as a rebuttal witness at the guilt phase of appellant's trial. [Vol. XI, pp. 1928-1930] Shelly testified he overheard a conversation between Johnson and cellmate and co-indictee Otis Lee Fairley in which, without objection by defense counsel, the following transpired at trial:

> Q. Tell me what you heard Mr. Johnson and Mr. Fairley say. Without telling anybody else.

> A. I overheard them talking about how one took the knife off the top of the car.
>
> Q. Which one was that?
>
> A. And gave it to the other one. Otis took the knife off the top of the car and gave it to Sam.
>
> Q. What did Sam say, if anything, if you remember?
>
> A. I don't remember. I can't remember where—he just stated that was the fact, the way he took the knife and *used the knife.*
>
> Q. Is that the gist of the conversation as best you can remember it?
>
> A. Yes, sir.
>
> [Vol. XI, p. 1930] [Emphasis added]

There was no objection and the defense cross-examined Norman Shelly. In this appeal the appellant pleads complete surprise and that he had no opportunity to interview the witness concerning this statement.

Defense made two motions before trial which in this assignment of error he asserts have been violated. The first was a motion for disclosure of witnesses, all evidence favorable to accused and discovery and inspection [Supplemental Abstract, pp. 389-390; Vol. II, pp. 207-210], which was granted. [Supplemental Abstract, p. 391; Vol. V, p. 706] The second was a motion to suppress written or oral statements made to Johnson by any investigating officer [Supplemental Abstract, pp. 392-393; Vol. II, pp. 224-226], which was granted as confessed by the D.A. *Tolbert v. State*, 441 So.2d 1374, 1375 (Miss.1983).

Johnson claims in this assignment the admission of the above conversation into evidence was reversible error because the prosecutor deliberately violated a court suppression order. He complains the suppression order directed that "no statement of the defendant regarding the facts can be used against him at the trial of this cause."

Contrary to what Johnson now asserts, the above conversation was not embraced in any discovery motion or discovery order.

Johnson's brief contains the following astonishing statements: "Shelly's testimony came as a complete surprise to the Appellant. Defense Counsel had no opportunity to interview the witness concerning the statements attributed to the Appellant." [sic] [Supplemental Brief, p. 1]

If this were the case, why did defense counsel make no objection? Further, the admission of this testimony was not assigned as error in the detailed motions for new trial. On appeal, Johnson has changed counsel. Johnson and his counsel go outside the record in claiming Shelly's testimony came as a complete surprise. No such claim appears in the record.

To permit a defendant and his counsel in any case, including a death penalty case, to sit idly by and make no objection to questionable testimony, exacerbate the matter still further by ignoring the testimony in the motion for new trial, and argue for the first time on appeal the admission of such testimony, would countenance the laying of a trap in every case. This is especially true where, as in this case, there has been a change in defense counsel.

In the first place, from this record we do not know if Johnson's counsel was unaware of this proferred testimony prior to trial. In the second place, it is clear from this record Johnson was ably represented by thorough defense counsel, and there may have been a very good reason why no objection was made.

The facts of this case are clearly distinguishable from *Tolbert v. State*, 441 So.2d 1374 (Miss.1983), and there is no merit in this assignment.

XIV.

VIOLATION OF RULE IN PERMITTING THE SHERIFF TO TESTIFY

In rebuttal Sheriff Lloyd Jones testified. Johnson complains that Sheriff Jones should not have been permitted to testify in rebuttal to deny he had a conversation with a defense witness Carl Lee. The reason is that Jones was not excluded from the courtroom when the rule was invoked. Permitting an officer of the court to remain in the courtroom is discretionary with the trial court. See: *Bell v. State*, 443 So.2d 16 (Miss.1984).

XV.

WAS DEFENDANT BROUGHT IN THE PRESENCE OF THE JURY IN HANDCUFFS?

Johnson goes outside the record and claims that he was brought into the courtroom in the presence of the jury in handcuffs. The record does not support this claim. Indeed, the record indicates that the court saw to it that this would not occur. [Vol. VIII, p. 1250]

XVI.

ADMISSION OF CHECKS FOUND IN AUTOMOBILE, WHICH CONTAINED FINGERPRINTS OF JOHNSON AND LANGHAM

The trial court permitted the introduction into evidence of checks found in the automobile, after ruling that they could only be referred to as "documents." [Vol. IX, pp. 1506-1511] These documents were not circulated to the jury but the fingerprint expert referred to them in his identification as having the fingerprints of Johnson.

XVII.

FAILURE TO PROVIDE JOHNSON WITH COUNSEL AT THE ARRAIGNMENT HEARING

Johnson complains, without citation of authority, the state failed to provide him with counsel at the "initial appearance hearing." He states this violated his constitutional rights. The record does not support this contention. [Vol. IV, p. 605, et seq.]

XVIII.

EXCLUSION OF JURORS WHO HAD CONSCIENTIOUS SCRUPLES AGAINST INFLICTION OF DEATH PENALTY

Johnson argues that it was error to exclude in the guilt phase of his trial jurors who clearly had fixed conscientious scruples against infliction of the death penalty. There was no error in excluding such jurors. See: *Wilcher v. State*, 448 So.2d 927 (Miss.1984); *Sonnier v. Maggio*, 720 F.2d 401 (5th Cir.1983); *Smith v. Balkcom*, 660 F.2d 573 (5th Cir.1981); *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir.1978); and *Woodard v. Hutchins*, 464 U.S. 377, 104 S.Ct. 752, 78 L.Ed.2d 541 (1984).

XIX.

THE ADMINISTRATION OF THE DEATH PENALTY IN THIS STATE IS ARBITRARY AND DISCRIMINATORY IN VIOLATION OF THE APPELLANT'S EIGHTH AND FOURTH AMENDMENT RIGHTS

Johnson claims that he was denied a request to present evidence on the death penalty being administered in an arbitrary and discriminatory manner. The record reveals Johson made a motion to strike and quash as unconstitutional the death penalty statute (Vol. II, pp. 239-243) and the hearing his counsel requested on the motion was held by the court. (Vol. IV, pp. 605-700).

Nothing offered by Johnson supports his contention that the death penalty is being administered unfairly because of either his or the victim's race.

PART B.

ROY NOBLE LEE, Presiding Justice, for the Court:

THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY ON THEIR OPTION TO RECOMMEND A LIFE SENTENCE EVEN IF AGGRAVATING CIRCUMSTANCES WERE FOUND TO OUTWEIGH MITIGATION.

The requested instruction, which was refused by the court, follows:

> The court instructs the jury that if you see fit, whether mitigating circumstances exist or not, you may recomment [sic] mercy for the defendant. This recommendation is solely in your discretion and not controlled by any rule of law. You may make such recommendation with or without a reason.

The appellant contends that refusal of the instruction constituted reversible error. However, the question has been resolved against the position of appellant in three (3) felony murder cases wherein the death penalty was imposed, viz, *Bullock v. State*, 391 So.2d 601 (Miss.1981); *Jordan v. State*, 365 So.2d 1198 (Miss.1978); and *Hill v. State*, 432 S.2d 427 (Miss.1983). In *Hill v. State*, a similar instruction to that refused here was under consideration. The Court said:

> Argument of appellant is that reversible error was made by the trial court when it failed to grant the following sentencing information requested by the defense:

Instruction D-2:

Ladies and gentlemen of the jury, I charge you that you need not find any mitigating circumstance in order to return a sentence of life imprisonment. A life sentence may be returned regardless of the evidence.

The appellant contends that this refusal had the effect of denying the jury the right to sentence him according to their feelings of mercy. He maintains that the jury was left with the impression that they were bound to return a verdict that the appellant should suffer the death penalty if they found that aggravating circumstances outweighed the mitigating circumstances from the evidence presented. According to him, this would be tantamount to a mandatory application of the death penalty and contrary to the mandate of individualized consideration handed down by the United States Supreme Court in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

We do not agree that the jury in the case in question was under any impression that they had no choice but to impose the death penalty. Their verdict was as follows:

> We, the Jury, unanimously find that the aggravating circumstances . . . outweigh the mitigating circumstances and are sufficient to impose the death penalty, and that there are insufficient mitigating circumstances to outweigh the aggravating circumstances. . . .

432 So.2d at 441.

The jury verdict in the case sub judice was almost verbatim to the verdict in *Jordan* and the same reasoning that applied there must prevail here.

Juries may pardon an accused by a not guilty verdict, when his guilt is overwhelming from the record; they may exercise clemency toward one found guilty, where the statute permits juries to fix the punishment, and the verdicts will be upheld. However, trial judges are required to instruct juries, according to the law.

The judgment of the lower court is affirmed and Wednesday, the 19th day of June, 1985, is set as the date for execution of the sentence and infliction of the death penalty in the manner provided by law.

AFFIRMED AS TO GUILT PHASE; AFFIRMED AS TO SENTENCING PHASE.

PATTERSON, C.J., WALKER, and ROY NOBLE LEE, P.JJ., and DAN M. LEE, PRATHER, ROBERTSON, SULLIVAN and ANDERSON, JJ., concur as to Part A.

HAWKINS, J., dissents as to Part B.

APPENDIX "A"

DEATH PENALTY CASES AFFIRMED BY THIS COURT:

Cabello v. State, 471 So.2d 332 (Miss.1985)
Billiot v. State, 454 So.2d 445 (Miss.1984)
Dufour v. State, 453 So.2d 337 (Miss.1984)
Stringer v. State, 454 So.2d 468 (Miss.1984)
Wilcher v. State, 455 So.2d 727 (Miss.1984)
Wilcher v. State, 448 So.2d 927 (Miss.1984)
Neal v. State, 451 So.2d 743 (Miss.1984)
Booker v. State, 449 So.2d 209 (Miss.1984).
Caldwell v. State, 443 So.2d 806 (Miss.1983)
Irving v. State, 441 So.2d 846 (Miss.1983)
Tokman v. State, 435 So.2d 664 (Miss.1983)
Leatherwood v. State, 435 So.2d 645 (Miss.1983)
Hill v. State, 432 So.2d 427 (Miss.1983)
Pruett v. State, 431 So.2d 1101 (Miss.1983)
Gilliard v. State, 428 So.2d 576 (Miss.1983)
Evans v. State, 422 So.2d 737 (Miss.1982)
King v. State, 421 So.2d 1009 (Miss.1982)
Wheat v. State, 420 So.2d 229 (Miss.1982)
Smith v. State, 419 So.2d 563 (Miss.1982)
Edwards v. State, 413 So.2d 1007 (Miss.1982)
Johnson v. State, 416 So.2d 383 (Miss.1982)
Bullock v. State, 391 So.2d 601 (Miss.1980)
Reddix v. State, 381 So.2d 999 (Miss.1980)
Jones v. State, 381 So.2d 983 (Miss.1980)
Culberson v. State, 379 So.2d 499 (Miss.1979)
Gray v. State, 375 So.2d 994 (Miss.1979)

Jordan v. State, 365 So.2d 1198 (Miss.1978)
Voyles v. State, 362 So.2d 1236 (Miss.1978)
Irving v. State, 361 So.2d 1360 (Miss.1978)
Washington v. State, 361 So.2d 61 (Miss.1978)
Bell v. State, 360 So.2d 1206 (Miss.1978)

DEATH PENALTY CASES REVERSED AS TO PUNISHMENT AND REMANDED FOR RESENTENCING TO LIFE IMPRISONMENT:

Edwards v. State, 441 So.2d 84 (Miss.1983)
Dycus v. State, 440 So.2d 246 (Miss.1983)
Coleman v. State, 378 So.2d 640 (Miss.1979)

DEATH PENALTY CASES REVERSED AS TO PUNISHMENT AND REMANDED FOR A NEW TRIAL ON SENTENCING PHASE ONLY:

Mhoon v. State, 464 So.2d 77 (Miss.1985)
Cannaday v. State, 455 So.2d 713 (Miss.1984)
Wiley v. State, 449 So.2d 756 (Miss.1984)
Williams v. State, 445 So.2d 798 (Miss.1984)

HAWKINS, Justice, dissenting as to Part B:

For the reasons stated in dissenting in *Hill v. State*, 432 So.2d 427, 453 (Miss.1983), and also adopting the views of Justice Robertson in his dissent in *Leatherwood v. State*, 435 So.2d 645, 660 (Miss.1983), I think the circuit judge erred in refusing to grant the instructions informing the jury it had the discretion to impose a life sentence upon Johnson, regardless of the evidence.

To me the jury system is sacred, a view apparently shared by the authors of our State Constitution, who wrote, "The right of trial by jury shall remain involate,

. . ."[1] It is not rhetoric or oratory, at least to me, to assert there is more wisdom in juries than can ever be enunciated by judges.

We learned 100 years ago in this state, after at least 150 years' experience, that the jury should have the absolute right, and should be instructed by the Court that they and they alone had such right, to spare the defendant's life regardless of the evidence: See: *Spain v. State*, 59 Miss. 19 (1881).

We recognize that opinions from the U.S. Supreme Court, beginning in 1972, have drastically changed capital offense laws and procedures, but no U.S. Supreme Court decision has ever suggested this discretionary power be removed from the jury to *spare the defendant's life.* Rather, the channeling of the jury's discretion was to limit the circumstances under which it could impose the death penalty, not the reverse.

Yet, this Court has held the jury is not entitled to be instructed by the circuit judge that it has this sacred right.

In doing so we ignore history and human experience; we implicitly overrule *Spain v. State.* We denigrate the majesty of our jury system. I can only urge this Court some day to change the present majority holding. I hope circuit judges of this State will unanimously, as many already do, tell the jury as we said 100 years ago, they have the discretion, regardless of the evidence, to sentence the defendant to life imprisonment rather than death.

---

[1] Mississippi Constitution, Article 3, § 31.

IN THE SUPREME COURT OF MISSISSIPPI

(Title Omitted in Printing)

EXCERPTS FROM PETITIONER'S MOTION FOR POST-CONVICTION RELIEF

(Filed August 4, 1986)

---

* * * *

II. The Trial Court Erred in Admitting a 19-Year-Old Prior Conviction as an Aggravating Circumstance

23. Johnson was denied his rights secured by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article 3, Sections 14, 16 and 28 of the Mississippi Constitution when the State introduced into evidence over petitioner's objection (R. 2196), and the jury relied upon, a 1963 New York Class D felony conviction for assault in the second degree because such conviction was invalid.

24. Johnson's 1963 New York conviction is invalid for the following reasons:

(a) It was obtained by police questioning subsequent to his indictment, while he was in custody, but without the presence of counsel. Under *People* v. *Waterman*, 9 N.Y.2d 561, 216 N.Y.S.2d 70 (1961) and other authorities, the use at trial of a conviction so obtained was fundamental error under the New York State Constitution and the Criminal Procedure Law.

(b) Johnson was never informed of his right to appeal during his sentencing hearing in 1963 and was never provided with competent appellate counsel after his trial and during subsequent post-conviction proceedings. This was error under *Douglas* v. *California*, 372 U.S. 353 (1963) (direct appeal) and *Lane* v. *Brown*, 372 U.S. 477 (1963) (*coram nobis*). This was also error under *People* v. *Montgomery*, 24 N.Y.2d 519, 299 N.Y.S.2d 156 (1976).

(c) Johnson's 1963 conviction is tainted by an involuntary confession which was introduced at his trial. The fact that no hearing was ever held as to the voluntariness of that confession is fundamental constitutional error. *Jackson* v. *Denno*, 378 U.S. 368 (1965). Johnson is entitled to a hearing on the voluntariness issue, and if a fair hearing cannot now be held, he is entitled to have his conviction vacated.

25. Said conviction is now subject to a Motion to Vacate Invalid Conviction pending in the Monroe County Court. *The People of the State of New York* v. *Samuel Bice Johnson*, No. 1723/63, Monroe County Court. *See* Appendix, Exhibit L.

III. The Record of the Prior Conviction Was Inaccurate and the State Misled the Jury on the Conviction

26. Johnson was denied his rights secured by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article 3, Sections 14, 16 and 28 of the Mississippi Constitution when the State introduced into evidence, and the jury relied upon, a 1963 New York Class D felony conviction because such conviction for assault in the second degree was not scrutinized by the court for its facial constitutionality and accuracy, but was simply admitted into evidence. Any examination into the record of the conviction would have shown such to be unconstitutional and invalid under the laws of New York and the United States Constitution.

27. The defense was grievously prejudiced by the State's constant and intense reference to the crime—22 times in its penalty phase closing—as "assault in the second degree with intent to commit rape in the first degree." Such references are plain and extremely prejudicial error. Petitioner was merely convicted of second degree assault, the least serious felony in New York, for which petitioner served but one year after which he was paroled for good behavior.

* * * *

IN THE SUPREME COURT
OF THE STATE OF MISSISSIPPI

September 1986 Term

(Title Omitted in Printing)

EXCERPTS—RESPONSE TO PETITIONER'S APPLICATION FOR LEAVE TO FILE MOTION FOR POST-CONVICTION RELIEF

(Filed November 6, 1986)

---

* * * *

Finally petitioner raises the question of his 1963 conviction in New York for assault with intent to rape. As of this date the conviction still stands. A petition for writ of error coram nobis has been filed with the courts of New York attacking this conviction on the basis of the failure to grant an appeal and failure to give a proper hearing on the voluntariness of the confession petitioner gave at the time. Because the record of the trial has been destroyed or lost relief will probably be granted. This would do no harm to the conviction here as there are two other valid aggravating circumstances existing in this case that the jury found.

However the question is the failure to investigate concerning this earlier conviction. The truth of the matter is that such a conviction is presumed to be correct just as counsel stated in his affidavit. Although the crime was assault in the second degree the indictment reads assault

with intent to commit rape. At the sentencing hearing the trial judge stated:

> And here he is now, a rapist and that's what he is; attacked an innocent young lady who was on her way to work in the kitchen of one of our local hospitals. He is without question lazy, a liar and a rapist.
>
> Exhibit K to Motion, at page 2.

Try as he may he cannot change what he was charged with and convicted. There was a trial with a jury and a conviction. Trial counsel was perfectly within sound trial practices to assume that a conviction that was 20 years old without a challenge was valid. Where is the prejudice as there are two other aggravating circumstances existing in this case.

* * * *

LETTER DATED MARCH 26, 1987 FROM ANTHONY PADUANO, ESQ., PETITIONER'S COUNSEL, TRANSMITTING CERTIFIED COPY OF THE MARCH 24, 1987 JUDGMENT OF THE NEW YORK COURT OF APPEALS TO THE MISSISSIPPI SUPREME COURT

CAHILL GORDON & REINDEL
Eighty Pine Street
New York, N.Y. 10005

March 26, 1987

Re: State v. Johnson,
No. 55,265

Dear Ms. Gordon:

Further to my letter of yesterday, I enclose for filing 10 copies of Exhibit M to the Appendix to Mr. Johnson's Motion for Post-Conviction Relief. Exhibit M is the March 24, 1987 Order and Decision of the Court of Appeals of the State of New York, the State's highest court, vacating Mr. Johnson's 1963 conviction for second degree assault and dismissing the underlying indictment.

Thank you for your assistance.

Yours sincerely,

/s/ Anthony Paduano
ANTHONY PADUANO

Hon. Sue Gordon
Clerk of the Court
Supreme Court of Mississippi
Box 177
Jackson, Mississippi 39205

[Enclosures]

FEDERAL EXPRESS

cc: Hon. Marvin L. White, Jr.
Hon. Clive A. Stafford Smith

Exhibit M

STATE OF NEW YORK
COURT OF APPEALS

THE PEOPLE &C.,
Respondent,

v.

SAMUEL BICE JOHNSON,
Appellant.

OPINION

Laurence T. Sorkin & Anthony Paduano, NY City, for appellant.

Howard R. Relin, DA, Monroe County (Melvin Bressler of counsel) for respondent.

PER CURIAM,

Defendant was convicted of murder in the State of Mississippi and presently awaits execution of a death sentence, which has been temporarily stayed pending decision on his petition for post-conviction relief. To advance his efforts to obtain such relief, defendant now seeks reversal of a 1963 New York assault conviction, which was used as an aggravating factor at the sentencing phase of the Mississippi trial.

We construe the Appellate Division order as one affirming the judgment of resentence and determining the review of the underlying 1963 conviction was not available. This order is appealable to this Court (CFL 450.90).

We agree that, as the defendant argues and the People concede, the passage of time does not bar appeal in the

unusual circumstances of this case, which include the possible use of the conviction as an aggravating factor leading to a death sentence. It is undisputed that defendant was never advised of his right to appeal from the assault conviction and that, upon discovering that right, he made several timely and diligent *pro se* attempts to obtain review of the judgment through the avenues available to him at the time. Further, it is undisputed that the actions of this State prevented defendant from ever obtaining the review of the conviction to which he was entitled.

The appeal is not barred by CPL 450.30(3), which provides, in essence, that the time for taking an appeal from the original judgment is not revived by a resentencing that occurs more than 30 days after the original sentence was imposed. Nor is appeal barred by CPL 460.30, which limits the time for seeking an extension of the 30-day period for taking an appeal to one year from the date that the statutory 30-day period expired. Both of these statutes became effective after the period between 1967 and 1971, when defendant's timely efforts to appeal were being thwarted by the State (*see People v. Montgomery*, 24 NY2d 130). In these special circumstances, the People, as they correctly concede, cannot rely upon a subsequently imposed time limitation to prevent a defendant from obtaining appellate review of his conviction (*People v. Thomas*, 47 NY2d 37). *People v. Corso* (40 NY2d 578), which held CPL 460.30 applicable to appeals from judgments of conviction entered prior to that statute's enactment, does not require a different conclusion, since that decision did not concern a situation in which the defendant had made timely efforts to raise an appealable issue before the statute was adopted.

Finally, the People concede that the records of defendant's trial have ben lost, that neither reconstruction nor a new trial is possible and that defendant has raised appealable issues with possible merit. Thus, the only available remedy at this point is vacatur of the conviction and dismissal of the indictment (*see People v. Rivera*, 39 NY2d 519).

Accordingly, the order of the Appellate Division should be reversed, the conviction vacated and the indictment dismissed.

Order reversed, conviction vacated and indictment dismissed. Opinion Per Curiam. Chief Judge Wachtler and Judges Simons, Kaye, Titone, Hancock and Bellacosa concur. Judge Alexander took no part.

Decided March 24, 1987

SUPREME COURT OF MISSISSIPPI

No. DP-43

SAMUEL BICE JOHNSON

v.

STATE OF MISSISSIPPI

May 27, 1987

Rehearing Denied July 14, 1987

ON MOTION FOR POST-CONVICTION RELIEF

HAWKINS, Presiding Justice, for the Court:

Samuel Bice Johnson filed a petition for relief under our Mississippi Uniform Post-Conviction Collateral Relief Act (CRA), Miss. Code Ann. § 99-39-1, et seq. We address only those assignments contemplated by the CRA for which we are authorized to review in a petition of this nature. For the reasons set forth, we deny his petition.

Following a trial held in the circuit court of Pike County on August 30-September 3, 1982, Samuel Bice Johnson was convicted of capital murder and sentenced to death. His conviction was affirmed by this Court on May 8, 1985, and his petition for rehearing was denied November 6, 1985; *Johnson v. State*, 477 So.2d 196

(Miss.1985). The United States Supreme Court denied his petition for certiorari, *Johnson v. Mississippi*, — U.S. ——, 106 S.Ct. 1958, 90 L.Ed.2d 366 (1986), and subsequently denied his petition for rehearing, — U.S. ——, 106 S.Ct. 2930, 91 L.Ed.2d 557 (1986).

On August 4, 1986, he filed with this Court his petition for relief under our Mississippi Uniform Post-Conviction Collateral Relief Act (CRA), Miss.Code Ann. § 99-39-1, et seq. His petition consists of 60 pages, supported by a brief of 85 pages, a supplemental motion to amend with supporting brief, and exhibits of several hundred pages. The petition contains 42 assignments, and the amendment to the petition adds another.[1]

The purpose of a CRA petition is set forth in Miss. Code Ann. § 95-39-3(2):

> (2) Direct appeal shall be the principal means of reviewing all criminal convictions and sentences, and the purpose of this chapter is to provide prisoners with a procedure, limited in nature, to review those objections, defenses, claims, questions, issues or errors which in practical reality could not be or should not have been raised at trial or on direct appeal.

Miss.Code Ann. § 99-39-21 reads in pertinent part:

> (1) Failure by a prisoner to raise objections, defenses, claims, questions, issues or errors either in fact or law which were capable of determination at trial and/or on direct appeal, regardless of whether such are based on the laws and the Constitution of the state of Mississippi or of the United States, shall

[1] Johnson was represented in his trial by Gerald Diaz and Gregory L. Harper of the Jackson Bar; on appeal to this Court by Kenneth J. Rose of the Atlanta Bar; in his petition to the United States Supreme Court by Clive A. Stafford Smith of the Atlanta Bar and in his present petition by Clive A. Stafford Smith of the Atlanta Bar and Laurence T. Sorkin and Anthony Paduano of the New York Bar.

constitute a waiver thereof and shall be procedurally barred, but the court may upon a showing *of cause* and *actual prejudice* grant relief from the waiver.

* * * *

(4) The term "cause" as used in this section shall be defined and limited to those cases where the legal foundation upon which the claim for relief is based *could not have been discovered with reasonable diligence at the time of trial or direct appeal.*

(5) The term "actual prejudice" as used in this section shall be defined and limited to those errors which would have actually adversely affected the ultimate outcome of the conviction or sentence. [Emphasis added]

(6) The burden is upon the prisoner to allege in his motion such facts as are necessary to demonstrate that his claims are not procedurally barred under this section.

In a petition of this nature, we are also governed by Miss.Code Ann. § 99-39-27(5):

> (5) Unless it appears from the face of the application, motion, exhibits and the prior record that the claims presented by such are not procedurally barred under section 99-39-21 and that they further present a substantial showing of the denial of a state or federal right, the court shall by appropriate order deny the application.

Moreover, we do not consider on a petition of this nature issues raised and decided on the original appeal, even though theories for relief different from those urged at trial and on appeal are now asserted. Miss.Code Ann. § 99-39-21(2), (3). *Dufour v. State*, 483 So.2d 307, 311 (Miss.1985), (and cases cited therein).

Within these circumscribed boundaries, we address the appropriate assignments in Johnson's petition.

I.

JOHNSON'S 1963 NEW YORK CONVICTION AS AN AGGRAVATING CIRCUMSTANCE

During the course of the sentencing phase of trial, the State introduced an authenticated copy of a judgment of conviction of Johnson of assault, second degree with intent to commit rape, first degree, rendered by the Monroe County court New York on April 9, 1963. This was offered as one of three aggravating circumstances to support the death penalty. (R. 2171-2173). Johnson did not testify either at the guilt or sentencing phase of his trial.

During the course of his argument, the district attorney recited this conviction as a basis for the jury to render a death penalty verdict. (R. 2273)

In his motion for a new trial and on appeal, Johnson objected to the introduction of the record of this conviction because it did not channel the jury's discretion by "clear and objective standards," and because it was too remote. (Appellant's Brief, pp. 29-31) We rejected both arguments. 477 So.2d at 218-219.

In his petition for certiorari to the U.S. Supreme Court, no claim of error was made to the introduction of this record into evidence as an aggravating circumstance.

In this petition, for the first time, Johnson argues that the 1963 conviction was invalid. Apparently, following or commensurate with its filing, Johnson's counsel also took steps to have this conviction vacated by the New York courts. This Court has been furnished with a copy of an order and slip opinion of the Court of Appeals of New York, dated March 24, 1987, in which that court

did indeed reverse and vacate this 1963 conviction and dismiss the indictment.

From the exhibits it appears that Johnson did not appeal his 1963 conviction and that he served a year in a New York correctional institution for this crime.

Miss.Code Ann. § 99-19-101(5)(b) provides:

> (5) Aggravating circumstances shall be limited to the following:
>
> * * * *
>
> (b) The defendant was previously convicted of another capital offense of or a felony involving the use of threat of violence to the person.

The aggravating circumstances enumerated in the court's instruction at trial were:

> (1) That the defendant, Samuel Johnson, was previously convicted of a felony involving the use or threat of violence to the person of another.
>
> (2) That the defendant, Samuel Johnson, committed the capital murder for the purpose of avoiding arrest or effecting an escape from custody.
>
> (3)The capital murder was especially heinous, atrocious and cruel.

(R.2236)

The verdict of the jury found all three of these aggravating circumstances existed. (R. 2294)

It is apparent that Johnson waived this claim, and it is procedurally barred. At no time during his direct appeal, or in his petition for certiorari to the U.S. Supreme Court did he argue his New York conviction was constitutionally invalid. Moreover, there is nothing to suggest he took any steps to vacate this conviction until he filed this petition. On appeal Johnson's counsel alleged thirteen assignments of error, and at Johnson's own urging, his counsel added seven additional assignments. None questioned the validity of his New York conviction. See *Evans v. State*, 485 So.2d 276 (Miss. 1986), at 280-281.

Also, the jury found three aggravating circumstances to support its verdict. Even if we conceded that the jury had no authority to consider this conviction, the remaining two aggravating circumstances were sufficient to support the jury's verdict. *Zant v. Stephens*, 462 U.S. 862, 880-884, 103 S.Ct. 2733, 2744-2746, 77 L.Ed.2d 235, 252-254 (1983); *Irving v. State*, 498 So.2d 305, 314 (Miss.1986).

Aside from the statutory limitation of review, we remain unpersuaded by this contention.

We have never faced this question. A somewhat similar question has been before us concerning the use of a prior criminal conviction to impeach a defendant in a criminal trial. We have held that subsequent reversal on appeal of a prior conviction did not affect a defendant's trial conviction. *Young v. State*, 425 So.2d 1022 (Miss.1983); *Milstid v. State*, 347 So.2d 1319 (Miss. 1977); and *Nicholson v. State*, 254 So.2d 881 (Miss. 1971).

Also, in *Phillips v. State*, 421 So.2d 476 (Miss.1982), the state used a Kentucky conviction as a basis for Phillips' conviction under one of Mississippi's habitual criminal statutes. Miss.Code Ann. § 99-19-81 (Supp.1984). We held that when the conviction was subsequently reversed, it could constitute a basis for post-conviction relief from the habitual criminal conviction.

Under Miss.Code Ann § 99-19-81, however, upon proof of the prior conviction a circuit judge has no alternative except to sentence to the maximum authorized by law. Such sentence cannot be suspended, and the accused will never be eligible for parole or probation prior to serving this maximum sentence. In the sentencing phase of a

capital murder trial the jury is not required to sentence the defendant to death, regardless of its finding.

When a prior conviction is used under either habitual offender statute, it is, of course, certain that the defendant will receive greater punishment. The admission of a prior conviction in order to impeach the accused as a witness, or at a sentencing phase of a capital murder trial may or may not materially influence the jury.

As we noted, the jury found three aggravating circumstances existed, and of the three we have little doubt that in a rational sentencing process *Zant v. Stephens*, supra, the other two aggravating circumstances would carry greater weight than the New York conviction in determining Johnson's sentence. Indeed, the remoteness in time of the prior conviction was a mitigating circumstance. *Johnson v. State*, 477 So.2d at 219.

We eschew "harmless error" in our reasoning, however, because the district attorney argued this particular aggravating circumstance as a reason to impose the death penalty. *Johnson v. State*, 477 So.2d at 219. Nevertheless, we reject New York's setting aside of the 1963 conviction as a basis to vitiate the verdict of the jury.

If there is one single point emphasized by the U.S. Supreme Court decisions of *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed. 2d 859 (1976); and *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), it is that before a jury is permitted to sentence a human being to death, it must have clear guidelines. The centerpiece of these decisions requires the jury to find one or more aggravating circumstances exist before they can impose the death sentence. Of course, any such "aggravating circumstance" must reasonably justify making the difference between imposing a life sentence or the death penalty.

If the death penalty is to be imposed without caprice or chance, there is no doubt that a crucial guideline to assist citizens who have this formidable responsibility is whether the convicted murderer has engaged in serious criminal conduct involving violence to other people in the past. Thus, the reason for Miss.Code Ann. § 99-19-101 (5)(b).

There is no question but that the state proved this aggravating circumstance in this case. At the time of Johnson's trial, New York had imposed a final conviction and Johnson had served his sentence.

If we adopted Johnson's argument, the state could never use a conviction as an aggravating circumstance, because of the extreme likelihood that a foreign state could overturn the prior conviction through collateral attack. The loss of this guideline to a jury would serve to return juries to the unbridled, unchannelled, and hence, unconstitutional discretion they had in imposing the death sentence.

We are not required in this case to go as far as *Nicholson*, *Milstid* and *Young*, *supra*, in authorizing introduction of proof of a prior conviction in a capital murder case. That is, in this case, we do not address whether a prior conviction can be used as an aggravating circumstance if that conviction is subsequently reversed on direct appeal. We do hold that a foreign state cannot vitiate the death penalty verdict in this state by setting aside a prior conviction of a violent crime through a collateral relief petition.

We deem it important to add in this case that there is no evidence or indication that the post-conviction relief proceedings in the New York courts were truly adversarial. Insofar as we can determine from Johnson's petition and exhibits, the state's attorney in New York had no significant interest or concern in vouchsafing the validity of his 1963 conviction, and we find no challenge

by the state's attorney of New York of Johnson's petition. Other than Johnson, this state had the greatest interest in upholding the validity of his New York conviction. Yet, this state was not made a party to Johnson's petition and had no voice in any of the New York proceedings to vacate his conviction. Indeed, we know of no method whereby this state could have been made a party to the New York proceedings, and this state probably should not have been a party. This does not remove the fact that the proceedings lacked an essential adversarial ingredient. The New York courts are, of course, the final and proper arbiters of all judicial proceedings in that state, including the disposition of post-conviction petitions. Assuredly, by our view, we suggest no impropriety in the courts of that state taking whatever action they deem appropriate in a criminal case in New York. The fact remains that Johnson was convicted in 1963 by a New York court of a serious felony involving violence to a female for which he was imprisoned in that state. No New York court extended Johnson relief from his conviction before Johnson paid his debt to the state. If his crime was serious enough for him to be convicted and final enough for him to serve time in a penal institution, it had sufficient finality to be considered as an aggravating circumstance by a jury of this state. No death penalty verdict based upon this conviction need be vitiated by the subsequent relief granted more than twenty years later by the New York Court of Appeals.

We accordingly reject all assignments of Johnson's petition based upon his 1963 conviction in the State of New York.

II

INEFFECTIVE COUNSEL

The only remaining assignments of Johnson not clearly procedurally barred are assignments VII and VIII wherein he claims his trial counsel were ineffective

in their representation of him during the guilt and sentencing phases of his trial, thus depriving him of his Sixth Amendment right to assistance of counsel. Under the assignments he lists some forty instances in which he claims his lawyers did not render professional service guaranteed to him by the Sixth Amendment.

The Sixth Amendment states the accused has the right "to have the Assistance of Counsel for his Defense."

Literally hundreds of court decisions have grappled with this phrase since the U.S. Supreme Court in *Powell v. State*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158, 84 A.L.R. 527 (1932), announced the Sixth Amendment required something more than just having a person with a law license sitting at the counsel table with an accused. Also, *Avery v. Alabama*, 308 U.S. 444, 446, 60 S.Ct. 321, 322, 84 L.Ed 377 (1940). A number of these cases are annotated and the various authorities examined in 4 A.L.R.4th 1—244 (1980); see also 1986 supplement.

In 1984 the U.S. Supreme Court in two seminal cases set forth guidelines to determine whether the constitutional guaranty had been met. *U.S. v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); and *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Strickland tells us the benchmark inquiry is whether defense "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686, 104 S.Ct. at 2064. It is an attack on the "fundamental fairness of the proceeding." *Id.* at 697, 104 S.Ct. at 2070. The Court then held the "proper standard for attorney performance is that of reasonably effective assistance," and it was incumbent upon a defendant to show that "counsel's representation fell below an objective standard of reasonableness. More specific guidelines are not appropriate." *Id.* at 687-688, 104 S.Ct. at 2064. Also,

"judicial scrutiny of counsel's performance must be highly deferential," and "every effort be made to eliminate the distorting effects of hindsight." *Id.* at 689, 104 S.Ct. at 2065. The Court must then determine, in light of all the circumstances, the identified acts or omissions were outside the *wide range* of professionally competent assistance." [Emphasis added] *Id.* at 690, 104 S.Ct. at 2066.

In addition, the accused must show he was prejudiced. That is, he must prove there is "a reasonable probability that but for counsel's *unprofessional* errors, the result of the proceeding would have been different." [Emphasis added] *Id.* at 694, 104 S.Ct. at 2068.

And finally, in determining whether ineffectiveness of counsel justifies setting aside a conviction, the appellate court may "independently weigh the evidence," and decide whether the aggravating and mitigating circumstances on balance warranted the death penalty.

This Court has followed the guidelines of *Strickland* in *Irving v. State*, 498 So.2d 305 (Miss.1986); *Evans v. State*, 485 So.2d 276 (Miss.1986); *Dufour v. State*, 483 So.2d 307 (Miss.1985); *Leatherwood v. State*, 473 So.2d 964 (Miss.1985); *Lambert v. State*, 462 So.2d 308 (Miss.1984); *Gilliard v. State*, 462 So.2d 710 (Miss. 1985).

What then does "assistance of counsel" mean?

It obviously means an accused has the right to a lawyer to represent him. Just as obviously, it cannot mean there is a constitutional guaranty to a lawer who in hindsight made no errors in defending the case. This would be tantamount to a constitutional guaranty of non-conviction. It would lend to continued court battles with successive defense lawyers, each of whom in hindsight could be found to have made mistakes. This never ending battle would continue until the state wearily threw in the towel. *Covington v. State*, 600 S.W.2d 186

(Mo.App.1980); *People v. Moody*, 676 P.2d 691 (Colo. 1984); *Commonwealth v. Saferian*, 366 Mass. 89, 315 N.E.2d 878 (1974); *State v. Wolf*, 347 N.W.2d 573 (N.D.1984).

Yet, if the Sixth Amendment guaranty has any meaning it must mean more than simply having a man admited to law practice as a defense lawyer for the accused. *U.S. v. Cronic, supra.* It must mean that a lawyer with some competence conscientiously represented the accused. *Dufour v. State, supra.* It must require both, because an incompetent can be conscientious, and an otherwise competent lawyer can by a lack of concern for his responsibility, fail in his adversarial duty.

Yet it does not necessarily mean that a lawyer was either incompetent or failed to responsibly represent his client because he made mistakes. However, conduct of an attorney, including the mistakes he made, can very well be of such proportion as to reveal the lack of competence or diligence. *Leatherwood v. State, supra.*

Therefore, any Court seeking to determine whether the constitutional guaranty has been met, must look at the entire performance of the attorney and determine whether the defense attorney was competent and whether he sincerely tried to assist his client. In *Dufour v. State*, supra, at 310, we stated: "There are, however, certain basic duties required of an attorney when representing a criminal defendant."

Unless the mistake or conduct was of such magnitude that the Court concludes the lawyer was incompetent or evidenced a failure to conscientiously fulfill his adversarial role, we will conclude the constitutional guaranty for performance of counsel as enunciated in *Strickland* has been met.

Admittedly, these criteria remain generalizations and subject to disagreement between lawyers and judges.

Nevertheless, the members of this Court have each had years to observe trial practice and procedure in this state, and each is able to pass judgment by studying a record to determine whether or not a particular attorney was both competent and had a responsible attitude in his client's defense of a lawsuit in this state.

Indeed, by studying a trial record an appellate judge cannot escape forming an opinion on the performance of trial counsel. The record in this case, contrary to Johnson's assertion, clearly reveals he was represented by competent counsel dedicated to his defense. We have again carefully reviewed the record, and our original view that he had competent, zealous counsel has been reinforced.

They most assuredly met the "reasonably effective assistance," and "wide range of professionally competent assistance," guidelines of *Strickland.* There clearly was no lack of competence, or failure of interest in their defense of Johnson to support the contention that the constitutional guaranty was not met.

III.

REFUSED MOTION FOR CONTINUANCE

For example, Johnson charges his counsel failed to properly move for a continuance, thereby depriving him of expert witnesses, H. Dale Nute and Stephen B. Halligan. These experts examined Johnson's and the other participants' homicide clothing, and studied the laboratory reports of the state and Federal Bureau of Investigation. We have reviewed their letter to Diaz, Johnson's trial defense counsel, dated August 23, 1982, and we find nothing in this report which compels us to conclude that the defense counsel erred in not having these witnesses present at trial. These experts did not reach a conclusion so at odds with the state's proof so as to seriously

challenge Johnson's guilt. Thus their absence from trial does not appear prejudicial.

It is just as plausible that their testimony would have been weak, and upon cross-examination their testimony would have helped the state's case. On the direct appeal of this case, we suspected Johnson's counsel moved for a continuance as a tactical gesture—not really expecting the court to grant it—but hoping that the circuit judge's refusal to grant the continuance would be considered error on appeal. It is not an altogether unfamiliar tactic of defense counsel in criminal as well as civil cases to produce an appeal record cluttered with adverse rulings. Some occasionally stick on appeal. The temptation to use this tactic increases in inverse proportion to the weakness of counsel's case.

IV.

WITHHOLDING OBJECTIONS TO CLOSING ARGUMENT

Of like import is Johnson's claim that his trial counsel were ineffective because they asked the trial judge to permit them to withhold objections to the state's argument until its completion and outside the presence of the jury. This clearly was a tactical decision of counsel. They, of course, knew they had the right to object whenever an improper argument was made. The very fact they made this request to the court evinced an awareness of this right. Rather than risk offending the jury by objecting during argument, they asked permission to withhold objection and make it outside the presence of the jury. We criticized this sort of practice because when an improper argument was in fact made, it did not give the circuit judge the opportunity to correct it promptly upon objection by opposing counsel.

A conscious choice of trial strategy by defense counsel which proves unfortunate is not to be equated with incompetency. *Roe v. State,* 95 Wis.2d 226, 290 N.W.2d

291 (1980); *State v. Baker*, 169 W.Va. 357, 287 S.S.2d 497 (1982). Moreover, in our original opinion we found that the state did not make a prejudicial argument.

V.

FAILURE TO RAISE INVALIDITY OF 1963 CONVICTION

Johnson's claim that his counsel were ineffective for failing to inquire into the invalidity of 1963 conviction ignores the fact that Johnson did not take the stand in the sentencing phase of his trial to assert his innocence of the New York conviction, overlooks Johnson's failure to assert his innocence in the pro se document he filed with this Court on direct appeal, and disregards his counsel's failure to assert it in his appeal to this Court or in his petition for certiorari before the U.S. Supreme Court. He filed no such petition urging us to consider this issue as an additional assignment of error to those filed by his counsel.

VI.

REMAINING INEFFECTIVE ASSIGNMENTS

The remaining complaints Johnson makes of his trial counsel are a litany of Monday morning quarterbacking, attempts to again litigate issues decided, and assertions outside the record. All these fall far short of demonstrating his counsel were not reasonably effective.

The record in this case reveals that two dedicated, assidious trial attorneys did the best they could to defend Johnson. Had the facts which pointed to Johnson's guilt not been overwhelming, his attorneys, no doubt, would have fared much better. In addition, the circuit judge, a jurist renowned for his patience, kindness and forbearance, more than lived up to his reputation in trying this case. No practicing attorney could hope for more consideration from a trial judge than these attorneys received in this case.

It is true we criticized defense counsel in our decision affirming Johnson's conviction for their manner of requesting a continuance, and by their request to withhold objections to the state's closing argument until its conclusion. But there was nothing about our comments to intimate that they harmed Johnson in doing so. To hold that Johnson's trial counsel, in this case, from this record, lacked that degree of competency guaranteed by the Sixth Amendment would make the Sixth Amendment virtually impossible to abide by. No rational mind can conceive of such a proscriptive constitutional requirement as a condition precedent to the validity of a criminal conviction.

The jury in this case believed that Johnson stabbed a highway patrolman in the back and instructed another to shoot him with the patrolman's own gun. Their verdict was supported by overwhelming evidence. This officer was carrying out his duty in a peaceful manner, and posed no physical threat to Johnson or any of his companions. Civilized society depends upon peace officers for its survival. Such a murder can be equated with treason.

In his motion for post-conviction relief, Johnson asserts assignments XII, XVIII and XXIII which he failed to raise at trial or on the direct appeal. Having failed to raise them at trial or upon appeal, Johnson waived his right to assert them in his motion for post-conviction relief. Miss.Code Ann. § 99-39-21 (Supp.1985); *Irving v. State*, 498 So.2d 305, 311 (Miss.1986); *Mann v. State*, 490 So.2d 910, 911 (Miss.1986); *Evans v. State*, 485 So.2d 276, 280 (Miss.1986); *Dufour v. State*, 483 So.2d 307, 308 (Miss.1985).

Johnson also asserts assignments III, IV, V, VI, VIII, IX, XI, XIII, XVI, XVII, XIX, XXI, XXII, XXIV and XXV, which were considered and addressed by us on the direct appeal of his case. Consequently, these assignments are res judicata and cannot be raised again. Miss.

Code Ann. § 99-39-21 (Supp.1985); *Irving v. State, supra; Evans v. State, supra.*

DENIED AND WEDNESDAY, JULY 22, 1987, IS SET AS THE DATE FOR EXECUTION OF THE SENTENCE AND INFLICTION OF THE DEATH PENALTY IN THE MANNER PRESCRIBED BY LAW.

WALKER, C.J., ROY NOBLE LEE, P.J., and DAN M. LEE, ANDERSON and GRIFFIN, JJ., concur.

ROBERTSON, PRATHER and SULLIVAN, JJ., dissent.

ROBERTSON, Justice, dissenting:

I.

In a question begging opinion considering a point of first impression in the administration of this state's capital sentencing system, the majority today denies Samuel Bice Johnson post-conviction relief. It does so contrary to reason and fairness. With respect for my colleagues, I dissent.

II.

The point arises from the order of the Court of Appeals of New York dated March 24, 1987, in which that court vacated and held for naught Johnson's April 9, 1963, conviction of assault, second degree with intent to commit rape, first degree rendered by the Monroe County Court of New York. We may take it that Johnson's 1963 conviction as of the moment is absolutely void and of no further force and effect. Our review of Johnson's capital murder trial in this state reflects that the 1963 conviction was proved by the prosecution and successfully—and argued vigorously—as an aggravating circumstance, compelling the conclusion that Johnson should be given the death sentence. Miss.Code Ann. § 99-19-

101(5)(b) (Supp.1986). The jury in fact found this as one of the aggravating circumstances, to wit:

That the defendant, Samuel Johnson, was previously convicted of a felony involving the use or threat of violence to the person of another.

Today, that prior conviction having been declared a legal nullity, the majority begins by holding Johnson's claim "procedurally barred," adding yet another dubious chapter to this Court's recent and illicit romance[1] with procedural bars. The majority's point, as I understand it, is that, by waiting until after his 1963 conviction had been vacated before asserting any claim for relief, Johnson waived any rights he may have had in the premises.

To my mind, the opposite conclusion follows. Johnson had no basis for the claim he asserts until he obtained the order of March 27, 1987, vacating his 1963 New York conviction. Had he raised the point prior to March 24, 1987, we would no doubt have dismissed it out of hand and, consistent with the temper of the time, would probably now hold the claim barred by res judicata.

In our only consideration heretofore of the procedure by which today's point ought be raised, *Phillips v. State*, 421 So.2d 476, 482-83 (Miss.1982), we held that

> [T]he proper challenge to such a defective conviction lies in a separate action brought expressly for that purpose.

421 So.2d at 482.

Phillips arose in the context of an attack upon a prior conviction which had been used for enhancement of sen-

---

[1] My view of the seamier side of this romance appears in *Evans v. State*, 441 So.2d 520, 531-33 (Miss. 1983) (Robertson, J., dissenting) and need not be repeated here. *See also Wheat v. Thigpen*, 793 F.2d 621, 626-27 n. 5 (5th Cir. 1986).

tence under our habitual offender statute. Miss.Code Ann. § 99-19-81 (Supp.1982). The Court held that a defective conviction was voidable, not void, and declared further that until such time as the conviction was judicially vacated in a separate proceeding, it could be used for habitual offender purposes. The Court then repeated that, rather than raising the point at the sentencing phase of the hibitual offender action, the defendant's remedy was a separate post-conviction action which, if successful, would no doubt then be the occasion for relief from his sentence as a habitual offender. *Phillips*, 421 So.2d at 483. The same rationale applies here.

III.

The majority next states that Johnson's death sentence should not be disturbed because, even should the prior conviction aggravating circumstance be eliminated, the jury found two other aggravating circumstances which remain undisturbed.[2] The majority then misreads *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed. 2d 235 (1983). *Stephens* considers only the federal constitutional question. It holds a death sentence not constitutionally infirm by reason of the invalidity of one of several statutory aggravating circumstances found by a jury. The majority's citation to *Stephens* begs today's question, for we are confronted with whether as a matter of a state law the vitiation of one of the aggravating circumstances found by the jury affords Johnson relief from his death sentence and, if so, what form that relief should take. *Stephens* merely sets minimal constitutional limitations and addresses in no way the question we ought to confront today.

---

[2] One of these is the highly problematic "the capital murder was espeically heinous, atrocious and cruel." *See Wiley v. State*, 484 So.2d 339-358-60 (Miss. 1986) (Robertson, J., concurring) and *Jones v. State* (Miss. No. Dp-60, dec. Jan. 28, 1987) (Robertson, J., concurring) (not yet reported).

IV.

One more point need be made before proceeding to the merits of today's state law question. The majority takes a swipe at the New York action suggesting that the Court of Appeals' March 24, 1987, order should be given less than full faith and credit. We are told that the March 24, 1987, proceedings were "less than adversarial." The point is disingenuous. For starters, I wonder if we would apply this approach in the converse situation. Where prior convictions have resulted from guilty pleas, would we say that those proceedings were less than adversarial and therefore give no credit to those convictions as aggravating circumstances. I think not. Further, I am confident the New York Court has displayed no greater penchant for vacating 25-year-old convictions than has this Court. Both pre- and post-*Cardozo*, the Court of Appeals of New York has enjoyed a reputation as one of the nations premiere state courts. I am not for a moment prepared in indulge in the cynical assumption that the New York Court did less than its duty when it ordered Johnson's 1963 conviction vacated.

V.

These things said, we confront a novel question. Where a previous conviction is proved as an aggravating circumstance, Miss.Code Ann. § 99-19-101(5)(b) (Supp. 1986), what is the impact upon a subsequent death sentence where thereafter the "aggravating" prior conviction is vacated? [3]

---

[3] The point was before us in *West v. State*, 463 So.2d 1048 (Miss. 1985). At the sentencing phase of West's trial, the prosecution had proved as aggravating circumstances two prior murder convictions in Georgia appeals from which were then pending. After West had been sentenced to die in Mississippi, the Georgia convictions were reversed. *West v. State*, 252 Ga. 156, 313 S.E.2d 67 (1984). We subsequently reversed West's conviction and sentence by reason of error in the guilt phase of his trial and, thus, never reached today's point which would have affected only the sentencing phase.

The point has been addressed, albeit obliquely, in two arguably analogous contexts. First, as indicated above, there is the case of Mississippi's habitual offender statutes. Miss.Code Ann. §§ 99-19-81 and -83 (Supp. 1986). The *Phillips* case discussed above considered an attack upon one of the two prior convictions which had been relied upon by the prosecution in seeking enhanced punishment. *Phillips* makes clear that the fact that the prior conviction is under attack affords the defendant no relief. The logic of the opinion, however, is quite unmistakable: should the prior conviction ultimately be set aside, the defendant would then be entitled to relief from his enhanced sentence.

No resort to a harmless error analysis would be made in such case, for proof of the prior convictions under Section 99-19-81 or 99-19-83, as the case may be, automatically results in enhanced punishment. Assuming vacation of a prior conviction leaves the defendant with only one prior conviction within the meaning of the habitual offender statutes, it would follow as a matter of law that the defendant would be entitled to have his sentence reduced to that provided for the underlying offense without enhancement. *Phillips*, therefore, suggests that Johnson may be entitled to relief from his death sentence.

On the other hand, as a matter of the law of evidence, we have for years held that a defendant could be impeached by a prior felony conviction even though his previous conviction was at the time pending on appeal. And, to be sure, *Nicholson v. State*, 254 So.2d 881, 883-84 (Miss.1971) finds no error in allowing such impeachment, even though the prior conviction is later reversed.[4] 254 So.2d at 884. One may search the *Nicholson* opinion in

[4] The majority's citations to *Young v. State*, 425 So.2d 1022 (Miss. 1983) and *Milstid v. State*, 347 So.2d 1319 (Miss. 1977) are without force or effect, for in neither of those cases had there been a reversal or vacation of the prior conviction used for impeachment.

vain for any reason why this result should obtain. The mere fact that a defendant's conviction of a previous offense is treated as final, though on appeal, begs the question of the effect to be given that prior conviction should it be reversed. *Nicholson* makes quite clear that

> after the conviction has been reversed it cannot be used for impeachment purposes until the defendant is again convicted.

254 So.2d at 884.

It would seem to follow upon ordinary reasoning that the reversal of the impeaching prior conviction should have the same effect on a pre-reversal trial.

My thought regarding the impeachment via conviction on appeal issue is that the prosecution, or any other party so using such a prior conviction, proceeds at its own risk. If the prior conviction on appeal should remain undisturbed—and that is certainly what happens in the overwhelming majority of cases, there is no infirmity in any new conviction. Where, however, the *Nicholson* situation arises, that is, where the impeachment conviction is later reversed, the structure of the argument would seem to become one of whether the harmless error rule applies. I have come to prefer a recent articulation of that rule, i.e., does the error at trial undermine confidence in the outcome? *See Malone v. State*, 486 So.2d 367, 368 (Miss. 1986).

I none sense the case at bar falls between the habitual offender situation considered in *Phillips* and the impeachment context of *Nicholson*. The prior conviction is certain to have an adverse impact upon one tried under the habitual offender statute. The impact of a prior conviction in an impeachment context is far more problematic. In the case at bar, we simply have no way of ascertaining with confidence whether the prior conviction was a significant factor in the jury's determination that Johnson should suffer the penalty of death. The jury was in-

structed at the penalty phase trial that the prior conviction was one aggravating circumstance it could consider. The prosecuting attorneys certainly argued that this aggravating circumstance was one that merited the death penalty. The "age" on the 1963 conviction could cut either way. On the one hand, the jury might have considered it remote and therefore given it little credit. On the other hand, the fact that Johnson had been involved in a violent crime in 1963 may have led others rationally to perceive that his penchant for violence had spanned two decades, his behavior beyond correction or reformation. We simply don't know.

Because of these uncertainties—and in the context of the fact that Samuel Bice Johnson's life is at stake—the majority quite correctly eschews rejection of Johnson's claim on a harmless error basis. Such is consistent with the numerous cases wherein we recognize that sentences of death are qualitatively different in severity from any other that the defendant is to be given the benefit of the doubt when questions of prejudicial impact arise. *See, e.g., Fisher v. State*, 481 So.2d 203, 211 (Miss.1985); *Jones v. State*, 461 So.2d 686, 690 (Miss.1984); *Billot v. State*, 454 So.2d 445, 455 (Miss.1984); *Neal v. State*, 451 So.2d 743, 750 (Miss. 1984); *Williams v. State*, 445 So.2d 798, 810-11 (Miss. 1984); *Laney v. State*, 421 So.2d 1216, 1217 (Miss.1982); *Irving v. State*, 361 So.2d 1360, 1363 (Miss.1978). The majority manages, nevertheless, to deny Johnson's petition.

VI.

These things said, in my view Johnson is entitled to relief. He has presented this Court with a certified copy of the order of the Court of Appeals of New York of March 24, 1987, sufficient that we should hold that as a matter of law that he has proved the factual basis of his post-conviction claim. Past that, the effect of the vitiation of his 1963 conviction as a matter of law for the reasons

set forth above, I would hold that vitiation of Johnson's 1963 New York conviction undermines confidence in the outcome of the penalty phase of his capital murder trial. I do not see how in candor the contrary may be contended. Accordingly, I would vacate the sentence of death imposed upon Johnson and restore the case to the active docket of the Circuit Court for a new trial on the question of sentence only.

PRATHER and SULLIVAN, JJ., join in this opinion.

IN THE SUPREME COURT OF MISSISSIPPI

AFFIDAVITS SUBMITTED TO COUNTY COURT FOR MONROE COUNTY, NEW YORK, IN SUPPORT OF MOTION TO VACATE JUDGMENT OF CONVICTION IN *PEOPLE* v. *JOHNSON*, INDEX 32/63, FILED JULY 30, 1986

STATE OF NEW YORK
COUNTY COURT
MONROE COUNTY

Indictment No. 32 (1963)

THE PEOPLE OF THE STATE OF NEW YORK,

—against—

SAMUEL BICE JOHNSON,
Defendant-Petitioner.

NOTICE OF MOTION

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavits of Anthony Paduano, Esq., Warren H. Heilbronner, Esq., the Honorable Richard D. Rosenbloom, Edward J. Nowak, Samuel Bice Johnson, Dorothy LaDelfa, and Michael Providence, the annexed affirmation of Anthony Paduano, Esq., and the accompanying Memorandum of Law and the existing record of all the proceedings heretofore had herein, pursuant to Section 440.10 of the Criminal Procedure Law a motion will be made in the County Court of Monroe, Part I thereof,

The Honorable John J. Connell, at the Courthouse, Hall of Justice, Rochester, New York, on the 8th day of August, 1986 at 9:30 a.m., or as soon thereafter as counsel can be heard, for an order vacating the March 12, 1963 conviction of the defendant or, in the alternative, for an order directing a hearing on the issues of whether the conviction was invalid as a matter of law because it was obtained (a) in violation of petitioner's right under state and federal constitutions and state statute, to the presence of counsel at interrogations which were conducted after initiation of formal criminal proceedings against petitioner, and during which the alleged confession was made; (b) in violation of petitioner's state and federal rights to be advised of his right to appeal from said conviction and to have appellate counsel appointed for him; and (c) in violation of the petitioner's state and federal constitutional rights to a separate hearing to determine the voluntariness of an alleged confession received in evidence against him at the trial resulting in said conviction; and for such other relief as the Court deems just and proper.

Dated: New York, New York
July 30, 1986

Yours, etc.

CAHILL GORDON & REINDEL
(a partnership including
professional corporations)
80 Pine Street
New York, New York 10005
(212) 701-3000
Attorneys for Defendant-Petitioner
Samuel Bice Johnson

To: Hon. Howard Relin
District Attorney, Monroe County
201 Hall of Justice
Rochester, New York 14614

STATE OF NEW YORK
COUNTY COURT
MONROE COUNTY

Indictment No. 32 (1963)
THE PEOPLE OF THE STATE OF NEW YORK

—against—

SAMUEL BICE JOHNSON,
Defendant-Petitioner.

AFFIDAVIT OF ANTHONY PADUANO IN SUPPORT OF MOTION TO VACATE JUDGMENT OF CONVICTION

STATE OF NEW YORK)
: ss:
COUNTY OF NEW YORK)

ANTHONY PADUANO, being duly sworn, deposes and says that:

1. I am a member of the Bar of the State of New York and an associate of the firm of Cahill Gordon & Reindel, 80 Pine Street, New York, New York 10005. I am one of the attorneys for Samuel Johnson, the petitioner herein. I make this affidavit in support of a motion pursuant to Criminal Procedure Law, § 440.10 subd. 1(h) to vacate his March 12, 1963 conviction for second degree assault on the ground that it was obtained in violation of petitioner's rights under the federal constitution and the constitution of this State.

2. Petitioner seeks review of his 1963 conviction because it is the principal aggravating circumstance relied upon by the State of Mississippi as justification for affirming a sentence of death imposed upon petitioner following his conviction for a capital murder in Mississippi.

3. Petitioner was indicted on February 21, 1963 in Monroe County, Indictment No. 32, for the crime of assault in the second degree. He was tried by jury in this Court between March 8-12, 1963, and a verdict of guilty was returned. Petitioner was sentenced on April 9, 1963 to 1½ to 3 years in prison. He was paroled on April 9, 1984, after serving one year. In 1967 petitioner filed but did not timely perfect an appeal of his 1963 conviction.

4. In 1971 petitioner wrote to this Court requesting review of that conviction. The Court construed his letter as a *coram nobis* petition, but denied it without a hearing on the merits. Petitioner responded affirmatively when asked by the Court whether he wished to file a notice of appeal from the denial, and the Public Defender's Office of Monroe County was appointed to represent petitioner on appeal. Due to ineffective assistance of counsel, however, such appeal was never prosecuted.

5. Petitioner's conviction was based in part on an involuntary confession introduced into evidence at his trial. *See* Affidavit of The Honorable Richard Rosenbloom; Affidavit of Samuel Bice Johnson. The confession was taken following indictment, while petitioner was in custody and without the presence of counsel. *See* Affidavit of Warren H. Heilbronner; Johnson Aff't. Its introduction at trial violated petitioner's rights under the New York State Constitution and the then applicable Code of Criminal Procedure.

6. Petitioner's rights were further violated by the trial court's failure to conduct a separate hearing on the voluntariness of the alleged confession before admitting it as evidence. *See People* v. *Huntley*, 15 N.Y.2d 72, 255 N.Y.S.2d 838 (1965).

7. Further, petitioner's right to appeal his 1963 conviction was effectively denied because he was never in-

formed of such right during his sentencing hearing, as is required by New York law. This was also error under *Douglas* v. *California*, 372 U.S. 353 (1963).

8. The state again violated petitioner's constitutional right to appellate counsel in connection with his subsequent effort to obtain post-conviction review and relief by appointing counsel who failed completely to perform. *See* Affidavit of Edward J. Nowak, Public Defender.

9. Review of petitioner's 1963 conviction is complicated by the State's loss or destruction of the record of the trial and other critical records of the case. *See* Affidavit of Dorothy LaDelfa; Affidavit of Michael Providence. Under New York law, the unavailability of these essential records requires reversal when a defendant has been deprived of his right to appeal. Moreover, without any record of the trial proceedings, it would be virtually impossible for the Court to conduct a full and fair *Huntley* hearing on the voluntariness of the confession on which the 1963 conviction depended.

10. A previous *pro se* application that may have petitioned for the relief sought herein was made and dismissed in 1971. No decision on the merits was rendered, however, and no appeal was ever taken by petitioner's court-appointed appellate counsel.

11. Inasmuch as there is a legal basis for vacating petitioner's March 12, 1963 conviction, and there is a factual basis for the assertion of such ground supported by the affidavits and exhibits submitted herewith, this Court should either grant the motion or direct a hearing on defendant's claim pursuant to Section 440.10 of the Criminal Procedure Law.

/s/ Anthony Paduano
ANTHONY PADUANO

Sworn and subscribed to before me this 29th day of July, 1986.

[Notary seal omitted in printing]

STATE OF NEW YORK
COUNTY COURT
MONROE COUNTY

Indictment No. 32 (1963)

THE PEOPLE OF THE STATE OF NEW YORK

—against—

SAMUEL BICE JOHNSON,
Defendant-Petitioner.

AFFIDAVIT OF THE HONORABLE RICHARD D. ROSENBLOOM

The affiant, the Honorable Richard D. Rosenbloom, in support of petitioner's motions for post-conviction relief, deposes and says:

1. My name is Richard D. Rosenbloom and I am a Justice of the Supreme Court of the State of New York and my chambers are in the Hall of Justice, Rochester, New York 14614.

2. In 1963 I participated in a program in the Monroe County Court whereby young attorneys were assigned from a pool to represent indigent persons accused of crimes. In February 1963 I was appointed by the County Court to represent Charles Taylor, who had been indicted on a charge of assault in the second degree. The petitioner, Samuel Bice Johnson, at the time known as Bice, was Taylor's co-defendant.

3. After being indicted for assault in the second degree, and a two-day trial by jury, the defendants were

found guilty. Taylor was sentenced to 2½ to 5 years; Johnson was sentenced 1½ to 3 years. Taylor, to my knowledge, did not take an appeal at the sentencing proceeding, the Court did not advise Taylor that he could take an appeal. I have had no contact with Taylor since his sentencing.

4. Because more than 23 years have passed since the trial and sentencing I have some difficulty in recalling all the facts of the case. I remember, however, that Taylor's defense was one of alibi. I recall also that Johnson's defense centered mostly on his assertion that he was actually "play-acting" with the woman involved in the crime.

5. For Johnson's part of the trial, the prosecution relied heavily on statements made by Johnson that amounted to a confession. The confession was prejudicial to the defendants, and I made a motion for a separate trial because of concern that the jury would use the substance of the confession against Taylor, my client, who made no confession. I submitted a request to charge the jury that Johnson's confession could not be considered to determine the guilt of Taylor. That request was granted by the Court.

6. I recall that Johnson's attorney, Warren H. Heilbronner, Esq., vigorously defended Johnson against the indictment. The accuracy and voluntariness of the confession introduced against Johnson were challenged by the defense. I know that I argued to the jury that it was its duty to determine whether the confession used against Johnson was given by him voluntarily.

7. I maintain in my files certain documents pertaining to the Taylor-Johnson trial. I do not, however, have transcript of the trial, nor have I ever seen such.

8. No separate hearing was conducted by the Court on the voluntariness of Johnson's confession. The trial of Taylor and Johnson took place well before the retro-

active decision of *People* v. *Huntley*, 15 N.Y.2d 72, 77, 255 N.Y.S.2d 838, 842-43 (1965) that requires a hearing apart from the trial when the voluntariness of a defendant's confession is at issue.

/s/ Richard D. Rosenbloom
RICHARD D. ROSENBLOOM
J.S.C.

Sworn and subscribed to before me this 28th day of July, 1986.

[Notary seal omitted in printing]

STATE OF NEW YORK
COUNTY COURT
MONROE COUNTY

Indictment No. 32 (1963)

THE PEOPLE OF THE STATE OF NEW YORK

—against—

SAMUEL BICE JOHNSON,
Defendant-Petitioner.

AFFIDAVIT OF WARREN H. HEILBRONNER

The affiant, Warren H. Heilbronner, Esq., in support of petitioner's motions for post-conviction relief, deposes and says:

1. I am a member of the bar of the State of New York and of the firm of Mousaw, Vigdor, Reeves, Heilbronner & Kroll. I maintain an office at 600 First Federal Plaza, Rochester, New York 14614.

2. When I was a young attorney, I was, like others, "volunteered" to represent indigent criminal defendants. In February 1963 I was appointed by Monroe County Judge George D. Ogden to defend Samuel Bice Johnson, known to me at that time as Samuel Bice against, charges of assault in the second degree.

3. I remember interviewing Johnson in prison and I believe it was just prior to his arraignment on February 26, 1963. I did not see Johnson prior to his indictment on February 21, 1963, which I believe was the date on

which I was appointed to represent Johnson by the Court.

4. I distinctly remember counsel for co-defendant Charles Taylor, now Justice Richard D. Rosenbloom, and I protesting vehemently to the Court that with such a short time between the indictment (February 21, 1963) the arraignment (February 26, 1963) and the order to start trial (March 8, 1963), we had inadequate time to investigate thoroughly into all of the facts prior to the start of the trial on March 10, 1963.

5. I recall no other specifics about Johnson's case. I have checked our firm's files and I have no documents pertaining to the case, the file in the case having been destroyed under our firm's file management program. I remember well that a good defense was presented by Johnson over the two day trial, and that Justice Rosenbloom and I cooperated in coordinating the defenses. Justice Rosenbloom and I were acquaintances, having been at the Columbia University Law School at the same time. I have a recollection that Taylor and Johnson testified, and that a police officer testified regarding statements on a confession made by Johnson.

6. I recall that the defendants were convicted of assault in the second degree. I do not believe that Johnson made a timely appeal and I recall that the Court at sentencing did not advise the defendants they had a right to appeal. I do not recall if I advised Johnson regarding an appeal. I have had no contact with Johnson since the day he was sentenced on April 9, 1963. I have never seen a transcript of the trial.

7. The Court did not hold a separate hearing on the voluntariness of Johnson's confession, although such issue was important to Johnson's defense. The Johnson-Taylor trial was held and the defendants convicted prior to the decision of *People* v. *Huntley*, 15 N.Y.2d 72, 77,

255 N.Y.S.2d 838, 842-43 (1965) that retroactively required a separate hearing on the voluntariness issue.

/s/ Warren H. Heilbronner
WARREN H. HEILBRONNER

Sworn to and subscribed before me this 28th day of July, 1986.

[Notary seal omitted in printing]

STATE OF NEW YORK
COUNTY COURT
MONROE COUNTY

Indictment No. 32 (1963)

THE PEOPLE OF THE STATE OF NEW YORK

—against—

SAMUEL BICE JOHNSON,
Defendant-Petitioner.

STATE OF NEW YORK)
: ss.:
COUNTY OF MONROE)

AFFIDAVIT OF EDWARD J. NOWAK

Edward J. Nowak, being duly sworn, deposes and says that:

1. My name is Edward J. Nowak and I am the Public Defender of the County of Monroe, New York. I maintain an office in the Executive Office Building, 10 North Fitzhugh Street, Rochester, New York 14614. I submit this Affidavit in support of petitioner's motion to vacate judgment of conviction.

2. Prior to my being appointed Public Defender in April, 1977, I was Chief of the Appeals Bureau in the Office of the Public Defender, from 1976 to April, 1977. For a period of some years, centering around 1970-71 and thereafter, the Office of the Public Defender came under intense public criticism for the inadequacy of its representation of indigent defendants. The Office at that time was severely under-funded and under-staffed. By

1971, the quality of representation provided by the Office had deteriorated to the point that, in 1972, the Monroe County Legislature contracted with the National Legal Aid and Defender's Assocition to evaluate the quality of its representation of indigent defendants. The resulting report was severely critical of management, administration, and services provided by the Office during the 1971-73 period.

3. I have reviewed the papers submitted by Samuel Bice Johnson in support of his motion to vacate his conviction by this Court in 1963 for second degree assault. It is my opinion, based on many years of representing criminal defendants in Monroe County and in the Supreme Court of New York, Appellate Division, 4th Department, that a court of competent jurisdiction in New York very likely will declare Johnson's conviction invalid and unconstitutional as a matter of law, and will issue an order vacating such conviction.

4. The grounds for relief alleged by Johnson are meritorious and present important issues under the laws of New York and the United States Constitution. Any one of Johnson's principal claims—custodial interrogation without presence of counsel, absence of post-conviction hearing to determine the voluntariness of his confession, failure of this Court to advise him of his right to appeal, and the State's failure to provide competent appellate counsel—is in my judgment sufficient ground to vacate the 1963 conviction. Together the grounds present an argument for post-conviction relief which, in my judgment, a New York court will find highly compelling.

5. Johnson's case is particularly compelling given that the State of New York has lost or destroyed critical records pertaining to the 1963 conviction, including the trial transcript, the jury instructions and the purported confession made by Johnson. It is beyond dispute that a New York court will at the very least set aside the 1963 conviction and order an evidentiary hearing as mandated by *People* v. *Huntley*, 15 N.Y.2d 72, 255 N.Y.S.2d 838 (1965), to examine the issues raised by Johnson. It is my judgment, however, that the 1963 conviction should and will be vacated, given the seriousness and fundamental nature of the constitutional error demonstrated by Johnson, together with the irremediable prejudice to his rights caused by the State's loss of essential trial records, and the fact that Johnson has already served his prison term for a conviction infected with constitutional error.

6. Johnson alleges that he received ineffective assistance of appellate counsel from this Office with respect to proceedings for post-conviction relief in 1971-72. I understand from examination of the records of this Office, and from information received from the Clerk's Office of the Supreme Court of New York, Appellate Division, 4th Department, that in 1971 Johnson filed a Notice of Appeal. Upon docketing Johnson's appeal, the Appellate Division, 4th Department, appointed the then Monroe County Public Defender, Nicholas Varlan, to represent Johnson in this appeal. However, for reasons of which I am not aware, but which surely were related to the difficult conditions under which the Office labored during that time, Johnson's appeal was never acted upon in any way by the Public Defender's Office.

[Conformed Copy; Executed and Notarized July 30, 1986]

_____

EDWARD J. NOWAK

Sworn and Subscribed to before me this — day of July, 1986

_____

Notary Public

STATE OF NEW YORK
COUNTY COURT
MONROE COUNTY

Indictment No. 32 (1963)

THE PEOPLE OF THE STATE OF NEW YORK

—against—

SAMUEL BICE JOHNSON,
Defendant.

STATE OF NEW YORK)
: ss:
COUNTY OF MONROE)

AFFIDAVIT OF SAMUEL BICE JOHNSON

The affiant, Samuel Bice Johnson, in support of his petition for post-conviction relief, deposes and says:

1. My name is Samuel Bice Johnson and I am incarcerated in the maximum security unit of the Mississippi State Penitentiary in Parchman, Mississippi under a sentence of death.

2. In 1963 I was convicted by Jury in this Court of assault in the second degree. I was sentence to 1½ to 3 years in prison. I was paroled for good behavior after one year.

3. I have a good recollection of the facts concerning my 1963 conviction for assault second. Charles Taylor and I were in my brother's car, which he loaned to me,

in the early morning hours of February 9, 1963. We picked up Malcena Doss after she was leaving another car. Doss was a prostitute. After I had sex with her I told her I had no money to pay her and refused to pay her and she got angry. She took down the number of the car and later she told the police that I attacked her. I didn't attack her.

4. Two days later on February 11, 1963, I was at my brother's house when two police officers came to the house and asked my brother where his car was the previous night. He said I had it. The officers asked me to come down to the police station. At the station one of the officers told me that a woman had reported being attacked and wanted to know where I had been with the car. I told him that I didn't attack anyone. I was arrested on February 11, 1963.

5. Later, in police custody, I was questioned in the police station. My nephew, brother and a friend, were with me. The detective who arrested me came in and told my brother, newphew and friend to leave. Then he told me that he had an indictment against me for attacking Malcena Doss and showed me the indictment. I was indicted on February 21, 1963.

6. After I was indicted and in jail I was questioned again by the detective. The detective told me that he knew I didn't attack anyone and that he knew Doss was lying. He said he just wanted to clear things up and told me to tell him what happened while I was with Doss. I told him constantly that I didn't attack anyone and for awhile this was all I said.

7. Then the detective and his partner talked to me. Then they brought Doss into the room with me and she said I was the person who attacked her. I told her that she was telling a damn lie and that she gave it to me. The detective took her away and left me with his partner who along with threatening to kill me, promised me that

I was going to get 20 years. I told him that I didn't attack Doss.

8. Then three uniformed police officers came into the room and all four of them started talking about messing me up if I didn't confess. They pushed me around a bit and then the detective came back into the room. The rest of them left.

9. The detective then told me that if I talked to him I wouldn't have to talk with them any more plus that I could see my mother who by this time had come to the police station. I told him that I didn't attack Doss and that she had became angry when I wouldn't pay her. The detective tried to get me to sign a statement but I wouldn't.

10. The detective took me into a room where Doss and a stenographer were. She said that I had attacked her and the stenographer wrote it all down. I said I didn't do it. The detective took Doss out and came back. He, the stenographer and I were in the room and he told me he could clear everything up without me having to go to court and I could go home if I told him and the stenographer what had really happened. I remember they had been talking to me and pushing me constantly without any break for a long time. I remember it was more than one whole day and I think it was about twelve or sixteen hours non-stop. So I talked to the detective and stenographer and told them what they wanted to hear. I didn't sign anything. He then locked me up but he did let me see my mother for about five minutes. Later, that day I was brought into the courtroom and arraigned before the judge.

11. I didn't see a lawyer until just before we went to court. I remember that it was a long time after I talked to the detective and the stenographer. I went in front of the judge and he appointed Warren Heilbronner to represent me. I saw the lawyer one time before we went to

trial. I remember that a police officer testified at the trial that I had confessed and that the district attorney introduced the statement as evidence against me. The judge did not ask me if my statements were voluntary. Mr. Heilbronner and I tried to prove that the police had coerced the statements from me in exchange for the promise that I could go home without going to court.

12. I was found guilty and I served one year in jail. At the time I was found guilty and sentenced I was not advised by the Court or by my attorney that I had a right to appeal. When I pleaded guilty to the charges brought against me later in 1966, 1975, and 1977, it was because my lawyers for those trials told me that my 1963 conviction was valid and therefore I was much better off pleading because otherwise I would have gotten a more severe sentence. I wouldn't have pleaded guilty to any of those charges if I had known that the 1963 conviction was invalid.

/s/ Samuel Bice Johnson
SAMUEL BICE JOHNSON

Sworn and Subscribed To Before Me This 29th Day of July, 1986

[Notary seal omitted in printing]

SUPREME COURT OF THE UNITED STATES

No. 87-5468

SAMUEL B. JOHNSON,
Petitioner

v.

MISSISSIPPI

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted, limited to Questions 1 and 2 presented by the petition.

January 11, 1988

Supreme Court, U.S.
FILED
FEB 27 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-5468

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SAMUEL BICE JOHNSON,

Petitioner,

—v.—

STATE OF MISSISSIPPI,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF FOR PETITIONER

CLIVE A. STAFFORD SMITH
SOUTHERN PRISONERS' DEFENSE COMMITTEE
185 Walton Street, N.W.
Atlanta, Georgia 30303
(404) 688-1202

LAURENCE T. SORKIN*
MARSHALL COX
ANTHONY PADUANO
CAHILL GORDON & REINDEL
(a partnership including professional corporations)
80 Pine Street
New York, New York 10005
(212) 701-3000

Attorneys for Petitioner Samuel Bice Johnson

**Counsel of Record*

February 25, 1988

QUESTIONS PRESENTED

1. Whether the Mississippi Supreme Court's refusal to recognize the judgment of the New York Court of Appeals vacating petitioner's 1963 conviction violates the Full Faith and Credit Clause of the Constitution?

2. In a death case where the principal aggravating circumstance relied on at sentencing was a 20-year-old out-of-state conviction, does the subsequent invalidation of that conviction—when there was no other evidence to support that aggravating circumstance—require petitioner to be resentenced?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
STATEMENT OF FACTS	3
1. The Mississippi Capital Murder Case	4
2. The Proceedings in New York	7
3. The Mississippi Supreme Court's Decision Denying Post-Conviction Relief	9
SUMMARY OF ARGUMENT	11
ARGUMENT	13
I. THE REFUSAL OF THE MISSISSIPPI SUPREME COURT TO RECOGNIZE THE JUDGMENT OF THE NEW YORK COURT OF APPEALS VACATING PETITIONER'S 1963 NEW YORK CONVICTION VIOLATES THE FULL FAITH AND CREDIT CLAUSE OF THE CONSTITUTION	13

	PAGE
II. THE DEATH PENALTY MAY NOT BE CONSTITUTIONALLY IMPOSED WHERE THE PRINCIPAL EVIDENCE RELIED ON AT SENTENCING IS A PRIOR CONVICTION LATER HELD TO BE UNCONSTITUTIONAL	18
A. The Eighth and Fourteenth Amendments Require Death Sentences To Be Based on Reliable Information	19
B. Reliance on a Subsequently Invalidated Prior Conviction at Sentencing in a Capital Case Requires Resentencing	21
C. Unconstitutional Evidence Weighed by a Jury Cannot Support a Death Sentence	24
III. PETITIONER'S CLAIMS ARE NOT PROCEDURALLY BARRED	27
CONCLUSION	31
STATUTORY APPENDIX	1a

TABLE OF AUTHORITIES

Cases: PAGE

Ake v. *Oklahoma*, 470 U.S. 68 (1985) 20

Arnold v. *State*, 236 Ga. 534, 224 S.E.2d 386 (1976) .. 25n

Baker v. *United States*, 388 F.2d 931 (4th Cir. 1968) ... 23n

Bandy v. *State*, 495 So. 2d 486 (Miss. 1986) 27n

Barclay v. *Florida*, 463 U.S. 939 (1983) 25, 26n

Beck v. *Alabama*, 447 U.S. 625 (1980) 20

Bennett v. *State*, 476 S.W.2d 281 (Tex. Crim. App. 1972) 17n

Bourgeois v. *Whitley*, 784 F.2d 718 (5th Cir. 1986) 23n

Boyd v. *United States*, 142 U.S. 450 (1892) 19n

In re Petition of Broom, 251 Miss. 25, 168 So. 2d 44 (1964) 28n

Burgett v. *Texas*, 389 U.S. 109 (1967).....11, 21, 21n, 22, 23, 24

Burrell v. *McMann*, 51 Misc. 2d 185, 273 N.Y.S.2d 9 (Sup. Ct. Clinton Co. 1966)..... 15

Caldwell v. *Mississippi*, 472 U.S. 320 (1985) 20

Coker v. *Georgia*, 433 U.S. 584 (1977) 18n

Coleman v. *State*, 378 So. 2d 640 (Miss. 1979) 7n

Commonwealth ex rel. Marshall v. *Gedney*, 478 Pa. 299, 386 A.2d 942 (1978)..... 16

PAGE

Davis v. *Davis*, 305 U.S. 32 (1938)..... 15-16

DeBussi v. *State*, 453 So. 2d 1030 (Miss. 1984) 28n

Douglas v. *California*, 372 U.S. 353 (1963) 20, 21

Estelle v. *Smith*, 451 U.S. 454 (1981)..... 20

Estin v. *Estin*, 334 U.S. 541 (1948)..... 15-16

Evitts v. *Lucey*, 469 U.S. 387 (1985) 21n, 22n

Farmland Dairies v. *Barber*, 65 N.Y.2d 51, 478 N.E.2d 1314, 489 N.Y.S.2d 713 (1985) 17n

Furman v. *Georgia*, 408 U.S. 238 (1972).....18n-19n, 19

Gardner v. *Florida*, 430 U.S. 349 (1977)..... 20

Gideon v. *Wainwright*, 372 U.S. 335 (1963) 21-22, 22n

Godfrey v. *Georgia*, 446 U.S. 420 (1980) 19

Granviel v. *Estelle*, 655 F.2d 673 (5th Cir. 1981), *cert. denied*, 455 U.S. 1003 (1982) 28n-29n

Gregg v. *Georgia*, 428 U.S. 153 (1976) 19

Hampton v. *McConnell*, 16 U.S. (3 Wheat.) 234 (1818) 14

Hathorn v. *Lovorn*, 457 U.S. 255 (1982)..... 29

Henry v. *Mississippi*, 379 U.S. 443 (1965) 28, 30

Hill v. *Blake*, 186 Conn. 404, 441 A.2d 841 (1982)..... 17n

Jackson v. *Denno*, 378 U.S. 368 (1964) 8, 20-21

James v. *Kentucky*, 466 U.S. 341 (1984)..... 28n

Johnson v. *Muelberger*, 340 U.S. 581 (1951) 14, 15

Kellogg v. *State*, 504 P.2d 440 (Okla. Ct. Crim. App. 1972)..... 18

PAGE

Leano v. *United States*, 494 F.2d 361 (9th Cir. 1974)... 23n

Lockett v. *Ohio*, 438 U.S. 586 (1978) 19

Loper v. *Beto*, 405 U.S. 473 (1972) 23

Martinez v. *Estelle*, 612 F.2d 173 (5th Cir. 1980) 21n

Martinez v. *United States*, 464 F.2d 1289 (10th Cir. 1972) 23n

Milliken v. *Meyer*, 311 U.S. 457 (1940)..... 16-17

Milwaukee County v. *M.E. White Co.*, 296 U.S. 268 (1935) 16

Mincey v. *Arizona*, 437 U.S. 385 (1978) 21n

Morris v. *Jones*, 329 U.S. 545 (1947)..... 14

NAACP v. *Alabama ex rel. Flowers*, 377 U.S. 288 (1964) 28n

NAACP v. *Alabama ex rel. Patterson*, 357 U.S. 449 (1958) 28n

Nixon v. *State*, ____ So. 2d ____, DP-65 (Miss. Nov. 25, 1987) 27

Odom v. *State*, 483 So. 2d 343 (Miss. 1986)..... 28n

People v. *Huntley*, 15 N.Y.2d 72, 204 N.E.2d 179, 255 N.Y.S.2d 838 (1965) 8, 15

People v. *Montgomery*, 24 N.Y.2d 130, 247 N.E.2d 130, 299 N.Y.S.2d 156 (1969).....8, 21n

People v. *Terry*, 61 Cal. 2d 137, 390 P.2d 381, 37 Cal. Rptr. 605, *cert. denied*, 379 U.S. 866 (1964) 18

People v. *Willis*, 79 A.D.2d 1036, 435 N.Y.S.2d 38 (2d Dep't 1981) 17-18

People ex rel. Sloan v. *Lawes*, 255 N.Y. 112, 174 N.E. 80 (1930) 15

PAGE

Phillips v. *State*, 421 So. 2d 476 (Miss. 1982) 7, 12, 24, 27, 28, 30

Smith v. *Murray*, 106 S. Ct. 2661 (1986) 25n-26n

Smith v. *State*, 477 So. 2d 191 (Miss. 1985)..... 29-30

State v. *Duke*, 205 Kan. 37, 468 P.2d 132 (1970) 16

State v. *Johnston*, 17 Wash. App. 486, 564 P.2d 1159 (1977) 17n

State v. *Prince*, 64 Idaho 343, 132 P.2d 146 (1942)..... 16

Stovall v. *Denno*, 388 U.S. 293 (1967)..... 21

Taylor v. *United States*, 472 F.2d 1178 (8th Cir. 1973) . 23n

Tehan v. *Shott*, 382 U.S. 406 (1966) 21

Tobias v. *State*, 505 So. 2d 1014 (Miss. 1987) 28n

Tokman v. *State*, 435 So. 2d 664 (Miss. 1983), *cert. denied*, 467 U.S. 1256 (1984)..... 7n

Townsend v. *Burke*, 334 U.S. 736 (1948).....11, 21, 23, 24

Underwriters Assurance Co. v. *North Carolina Life & Accident & Health Insurance Guaranty Ass'n*, 455 U.S. 691 (1984).....13, 14

United States v. *Hubbard*, 618 F.2d 422 (7th Cir. 1980) 23n

United States v. *Lemon*, 723 F.2d 922 (D.C. Cir. 1983) 23n

United States v. *Malcolm*, 432 F 2d 809 (2d Cir. 1970) . 23n

United States v. *Picard*, 464 F.2d 215 (1st Cir. 1972)... 23n

United States v. *Satterfield*, 743 F.2d 827 (11th Cir. 1984), *cert. denied*, 471 U.S. 1117 (1985) 23n

United States v. *Tucker*, 404 U.S. 443 (1972).....11, 21-24

United States ex rel. Savini v. *Jackson*, 250 F.2d 349 (2d Cir. 1957)..... 17

PAGE

United States v. *Walters*, 526 F.2d 359 (3d Cir. 1975) .. 23n

Wainwright v. *Goode*, 464 U.S. 78 (1983) 26n

Walker v. *United States*, 636 F.2d 1138 (6th Cir. 1980). 23n

Wheat v. *Thigpen*, 793 F.2d 621 (5th Cir. 1986), *cert. denied*, 107 S. Ct. 1566 (1987).....29, 29n

Williams v. *Georgia*, 349 U.S. 375 (1955)..... 30

Williams v. *State*, 456 So. 2d 1042 (Miss. 1984) 10n

Wisconsin v. *Pelican Insurance Co.*, 127 U.S. 265 (1888) 17n

Ex parte Wolfson, 30 Cal. 2d 20, 180 P.2d 326 (1947) 16, 17n

Woodson v. *North Carolina*, 428 U.S. 280 (1976)..... 30

Zant v. *Stephens*, 462 U.S. 862 (1983).....11, 21, 24, 25, 25n, 26, 26n

Constitutional Provisions:

United States Constitution

Art. IV, § 1 .....i, 2, 11, 13, 14, 15, 16, 17n, 18, 1a
Amend. V 20
Amend. VI 20
Amend. VIII.....2, 19, 1a
Amend. XIV.....2, 19, 1a

Law Reviews:

Cornish & Sealy, *Juries and the Rules of Evidence* [London School of Economics Jury Project], [1973] Crim. L. Rev. 208 ..... 19n

PAGE

Corwin, *The "Full Faith and Credit" Clause*, 81 U. Pa. L. Rev. 371 (1933) 14n

Costigan, *The History of the Adoption of Section I of Article IV of the United States Constitution*, 4 Colum. L. Rev. 470 (1904) 14n

Jackson, *Full Faith and Credit, The Lawyer's Clause of the Constitution*, 45 Colum. L. Rev. (1945) 14

Nadelmann, *Full Faith and Credit to Judgments and Public Acts*, 56 Mich. L. Rev. 33 (1957)..... 13

Statutes:

Judicial Code

28 U.S.C. § 1257(3)(1982) 2
28 U.S.C. § 1738 (1982) 2, 1a

Miss. Code Ann.

§ 97-3-19 (Supp. 1987) 2, 2a
§ 99-19-101 (Supp. 1987).....2, 6, 7n, 3a
§ 99-39-21 (Supp. 1987) 27

N.Y. Crim. Proc. Law

§ 440.10 (McKinney 1983) 7
§ 460.10 (McKinney 1983) 15

Treatises:

L. Baughman, *Southern Rape Complex* (1966) 19n

C. Hernton, *Sex and Racism in America* (1965) 19n

H. Kalven & H. Zeisel, *The American Jury* (1966)..... 19n

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-5468

SAMUEL BICE JOHNSON,

Petitioner,

—v.—

STATE OF MISSISSIPPI,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF FOR PETITIONER

This brief is respectfully submitted by petitioner Samuel Bice Johnson, who was sentenced to death for capital murder in Mississippi in 1982. It seeks reversal of his death sentence.

OPINIONS BELOW

The opinion of the Supreme Court of Mississippi denying petitioner's motion for post-conviction relief is reported as *Johnson* v. *State*, 511 So. 2d 1333 (Miss. 1987); it is reprinted at JA. 98-114.[1] The opinion of that court affirming Johnson's 1982 conviction and sentence on direct appeal is reported as *Johnson* v. *State*, 477 So. 2d 196 (Miss. 1985), and is reprinted at JA. 35-88.

---

1 "JA. ____" references are to pages in the Joint Appendix.

The decision of the New York Court of Appeals reversing Johnson's 1963 conviction for assault in the second degree and dismissing the underlying indictment is reported as *People* v. *Johnson*, 69 N.Y.2d 339, 506 N.E.2d 1177, 514 N.Y.S.2d 324 (1987) (*per curiam*). The opinion of the New York Supreme Court, Appellate Division, Fourth Department denying Johnson's motion to vacate his 1963 conviction is reported as *People* v. *Johnson*, 125 A.D.2d 1008, 509 N.Y.S.2d 789 (4th Dep't 1986); that court's order denying rehearing is unreported. The opinion of the County Court for Monroe County resentencing Johnson but otherwise denying post-conviction relief is unreported.[2]

JURISDICTION

The judgment of the Supreme Court of Mississippi denying Johnson's motion for post-conviction relief was entered on May 27, 1987. A motion for rehearing was timely filed on June 11, 1987 and was denied on July 15, 1987. The petition for certiorari was filed on September 14, 1987 and was granted on January 11, 1988, limited to Questions 1 and 2.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3) (1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Article IV, § 1 and the Eighth and Fourteenth Amendments to the Constitution of the United States; 28 U.S.C. § 1738 (1982); and Miss. Code Ann. §§ 97-3-19 and 99-19-101 (Supp. 1987). These provisions are set forth in the Statutory Appendix to this brief.

---

2 Copies of the New York decisions below have been lodged with the Clerk of this Court.

STATEMENT OF THE CASE

Samuel Johnson was tried and convicted of capital murder in Pike County, Mississippi, and was sentenced to death on September 3, 1982. His conviction and sentence were affirmed on direct appeal by the Mississippi Supreme Court on May 8, 1985. *Johnson* v. *State*, 477 So. 2d 196 (Miss. 1985) (JA. 35-88). A timely petition for certiorari was denied on May 5, 1986. *Johnson* v. *Mississippi*, 476 U.S. 1109 (1986) (Brennan and Marshall, JJ., dissenting). A petition for rehearing was also denied. *Johnson* v. *Mississippi*, 476 U.S. 1189 (1986).

On August 4, 1986 Johnson filed a motion for post-conviction relief in the Mississippi Supreme Court. On March 24, 1987, while this motion was pending, the New York Court of Appeals reversed Johnson's 1963 New York conviction for second degree assault, which had been relied on at sentencing in the 1982 Mississippi trial (JA. 19-24; 26-30).

On May 27, 1987 the Mississippi Supreme Court denied Johnson's motion for post-conviction relief. *Johnson* v. *State*, 511 So. 2d 1333 (Miss. 1987) (JA. 98-114). Justices Robertson, Prather and Sullivan dissented (JA. 114-21).

On July 13, 1987 the Mississippi Supreme Court granted a stay of execution to permit Johnson to seek review of its May 27, 1987 decision in this Court (JA. 2). On July 15, 1987 the Mississippi Supreme Court denied Johnson's petition for rehearing without opinion (JA. 2).

A petition for a writ of certiorari was filed on September 14, 1987, and the petition was granted on January 11, 1988, limited to Questions 1 and 2.

STATEMENT OF FACTS

Samuel Bice Johnson is a 45-year-old black man from Rochester, New York. In 1963, when he was 20 years old, he was convicted of second degree assault in the County Court for Monroe County, New York, as a result of an incident involving

his refusal to pay a prostitute for her services (JA. 136-37). A confession was introduced at his trial without a hearing to determine its voluntariness, despite his protestation that it was the product of coercion (JA. 128; 131; 137-39). Johnson was sentenced to a prison term of 1½ to 3 years, served one year and was paroled for good behavior. He was not advised of his right to appeal from that conviction, and his repeated *pro se* efforts to obtain review of it were unsuccessful.

1. The Mississippi Capital Murder Case

In 1982 Johnson was tried in Pike County, Mississippi, and convicted of capital murder in connection with the killing of a white State Highway Patrolman, Billy Langham. Langham had been stabbed and then shot to death after stopping a car in which Johnson, Charles Montgomery, Jr., Anthony Fields and Otis Lee Fairley were driving on U.S. Highway 49 near Collins, Mississippi (JA. 35).[3] Fields agreed to testify against the other three men, and was allowed to plead guilty to being an accessory after the fact of capital murder (JA. 39).[4] Johnson, Montgomery, and Fairley were each charged and separately tried for capital murder. Montgomery and Fairley each received life sentences (JA. 35).[5] Only Johnson was sentenced to death.

---

3 There is no dispute that the person who shot Officer Langham was Montgomery. This fact was conceded by the prosecutor at trial (R. 2277) and acknowledged by the Mississippi Supreme Court on direct appeal. 477 So. 2d at 206-07 (JA. 38). The State's theory was that Johnson first stabbed the officer and then told Montgomery to shoot him. The defense theory was that Fields, not Johnson, stabbed the officer. Three eyewitnesses called by the State gave a description of the person who did the stabbing that fit Fields, but not Johnson (R. 1298-99; 1326-27; 1332). "R. _____" references are to the record on direct appeal of Johnson's 1982 trial.

4 Fields pleaded guilty to being an accessory after the fact of capital murder and was sentenced to 5 years in prison. As part of the plea bargain, he was sentenced to 25 years for other crimes.

5 Montgomery was convicted of capital murder, but received a life sentence. Fairley was convicted of murder and sentenced to life imprisonment. The trial court did not allow Johnson's jury to be told what sentences they received (R. 2135).

After a three-day trial Johnson was found guilty of capital murder (R. 2129). At the sentencing hearing before the same jury, the only new evidence that the prosecutor introduced was a purported authenticated copy of Johnson's 1963 conviction for second degree assault in Monroe County, New York.[6] That document described Johnson's 1963 conviction as for "second degree assault with intent to commit first degree rape." The prosecutor did not offer any new evidence at sentencing to support the other two aggravating circumstances that the jury ultimately found (R. 2164-66) and barely mentioned either in his closing argument (JA. 19-24; 26-30).

The prosecutor's closing argument at the sentencing phase referred to Johnson's 1963 New York conviction some 22 times (JA. 19-24; 26-30), telling the jury, *inter alia*:

- "[A] lot of good-hearted and well-meaning people who don't understand the purpose and the necessity of capital punishment will probably say that I'm very cold and harsh and cruel when I stand here and I say that *because of having been convicted of second degree assault with intent to commit first degree rape and capital murder that Samuel Johnson should die.*" (JA. 23) (emphasis added)

- "*What concerns me is what is going to happen the next time he decides to commit a second degree assault with intent to rape* and what is going to happen the next time he decides he wants a Highway Patrolman or another law enforcement officer dead." (JA. 26) (emphasis added)

- "*When you vote to tell Judge Pittman that Samuel Johnson should suffer the penalty of death, you're going to be telling Samuel Johnson and others like him who commit second degree assault with the intent to commit*

---

6 Although the prosecutor referred in closing argument to the "certified copy of Samuel Johnson's conviction" (JA. 20)—and invited the jury to take the document to the jury room while it deliberated (JA. 20)—what he introduced was actually a certified copy of the record of Johnson's commitment to Elmira Reception Center, where Johnson served his sentence (JA. 8-9).

first degree rape and who have a high potential for violence and who murder Highway Patrolmen and other innocent people when they're doing their jobs and going about their own business, *you're going to be telling them that the people of our state have the courage to rid our state of people like that; that we don't want people like that in our state, especially when they have a violent record like that and the potentiality of hurting somebody else.*" (JA. 27) (emphasis added)

- "*But it [a vote for death] will also stop Samuel Johnson from hurting anybody else and it will tell others like him that we don't reward people who commit second degree assault with the intent to commit first degree rape* and who are returned to the penitentiary again and again and again and who have high potentiality for violent acts and who kill law officers who are doing their jobs." (JA. 29) (emphasis added)

- "*You are not the one executing Samuel Johnson. Regardless of what they tell you, you're not the one. He chose that himself when he decided to be a criminal in 1963.*" (JA. 30) (emphasis added)

The sentencing instructions required the jury to specify any aggravating circumstances that it found (JA. 15-17). The jury found three such circumstances: that Johnson had a prior violent felony conviction (Miss. Code Ann. § 99-19-101(5)(b)), that the murder was "especially heinous, atrocious and cruel" (Miss. Code Ann. § 99-19-101(5)(h)), and that it was committed to avoid arrest or escape from custody (Miss. Code Ann. § 99-19-101(5)(e)) (JA. 32). Following instructions which told it to weigh the aggravating circumstances against the mitigating circumstances (JA. 12-13; 15; 17-18), the jury concluded:

> "We, the Jury, find unanimously from the evidence and beyond a reasonable doubt that after weighing the mitigating circumstances and aggravating circumstances, one against the other, that the aggravating circumstances do outweigh the mitigating circumstances and that the Defendant should suffer the penalty of death." (JA. 32)[7]

After his capital murder conviction was affirmed on direct appeal, Johnson filed a petition for post-conviction relief in the Mississippi Supreme Court. His petition alleged, among other things, that the 1963 New York conviction relied on at sentencing was unconstitutional. Under Mississippi procedure, a defendant seeking to challenge the validity of an out-of-state conviction used to enhance a sentence in Mississippi must first challenge the conviction in the state where it was entered. *Phillips* v. *State*, 421 So. 2d 476, 481-82 (Miss. 1982). If successful, the defendant may then bring the vacatur to the attention of the Mississippi courts by motion for post-conviction relief. Johnson followed the procedure in *Phillips* by bringing a proceeding in New York to challenge his 1963 conviction.

2. The Proceedings in New York

On July 30, 1986 Johnson commenced a proceeding for post-conviction relief pursuant to N.Y. Crim. Proc. Law § 440.10 (McKinney 1983) in the County Court for Monroe County, New York, seeking to vacate his 1963 assault conviction. He argued that his 1963 conviction was unconstitutional on at least three grounds and submitted affidavits supporting his claims, including one by a sitting Justice of the Supreme Court of the State of New York who had represented Johnson's co-defendant at the 1963 trial. The affidavits established that a confession obtained from Johnson was introduced at the 1963 trial, that use of the confession was contested at trial on the

---

7 The jury was required to make certain written findings of fact before imposing a death sentence. Miss. Code Ann. § 99-19-101(3) (Supp. 1987). Under Mississippi law, the jury need not specify mitigating circumstances, and may decide not to impose the death penalty even if aggravating circumstances outweigh mitigating circumstances. *Tokman* v. *State*, 435 So. 2d 664, 669 (Miss. 1983), *cert. denied*, 467 U.S. 1256 (1984); *Coleman* v. *State*, 378 So. 2d 640, 646 (Miss. 1979).

ground that the confession was involuntary,[8] and that no hearing was held on the issue of voluntariness, as required by *Jackson* v. *Denno*, 378 U.S. 368 (1964), and *People* v. *Huntley*, 15 N.Y.2d 72, 204 N.E.2d 179, 255 N.Y.S.2d 838 (1965).

The affidavits also established that Johnson was not informed of his right to take a direct appeal from the 1963 conviction (JA. 127-39) in violation of his rights under *People* v. *Montgomery*, 24 N.Y.2d 130, 247 N.E.2d 130, 299 N.Y.S.2d 156 (1969). In 1967 Johnson had filed a *pro se* notice of appeal, which a court clerk in Monroe County dismissed as "untimely," not knowing that Johnson had not previously been advised of his right to appeal (JA. 96; 125). Between 1967 and 1971 Johnson made two other *pro se* efforts to obtain relief from the denial of his right to a direct appeal and violation of his rights under *Huntley*. In 1971 the Monroe County Public Defender's Office was appointed to represent Johnson on an appeal from the denial of a *coram nobis* application attacking the 1963 conviction, but that office never perfected the appeal or filed a brief on Johnson's behalf (JA. 134-35).

On October 25, 1986 the County Court ordered that Johnson be resentenced to permit him to take a direct appeal from his 1963 conviction. Johnson then appealed to the Appellate Division, Fourth Department, which denied him relief. 125 A.D.2d 1008, 509 N.Y.S.2d 789 (4th Dep't 1986).

The New York Court of Appeals granted leave to appeal, and on March 24, 1987 that court unanimously reversed the Appellate Division's order, vacated the 1963 conviction and dismissed the underlying indictment on the ground that Johnson had been denied his constitutional right to appeal and had demonstrated by affidavits the existence of "appealable issues with possible merit," including the admission of the confession challenged as coerced. *People* v. *Johnson*, 69 N.Y.2d 339, 506 N.E.2d 1177, 514 N.Y.S.2d 324 (1987) (*per curiam*) (JA. 95-97). In its decision, the New York Court of Appeals stated:

8 The affidavits indicated that the 20-year-old Johnson gave a statement to the police after having been interrogated for 12-16 hours while awaiting arraignment (JA. 138).

> "It is undisputed that defendant was never advised of his right to appeal from the assault conviction and that, upon discovering that right, he made several timely and diligent *pro se* attempts to obtain review of the judgment through the avenues available to him at the time. Further, it is undisputed that the actions of this State prevented defendant from ever obtaining review of the conviction to which he was entitled." *Id.* (JA. 96)

Johnson promptly notified the Mississippi Supreme Court, which had previously been advised of the New York proceedings,[9] that the New York Court of Appeals had vacated his 1963 conviction and filed with it a certified copy of the New York judgment (JA. 94).

3. The Mississippi Supreme Court's Decision Denying Post-Conviction Relief

On May 27, 1987 the Mississippi Supreme Court denied Johnson's motion for post-conviction relief. The court noted that while it had "little doubt that in a rational sentencing process . . . the other two aggravating circumstances would carry greater weight than the New York conviction in determining [petitioner's] sentence," it was required to "eschew 'harmless error' in [its] . . . reasoning . . . because the district attorney argued this particular aggravating circumstance as a reason to impose the death penalty." 511 So. 2d at 1338 (JA. 104). A majority of the court held, however, that "a foreign state cannot vitiate the death penalty verdict in this state by setting aside a prior conviction of a violent crime through a collateral relief petition." 511 So. 2d at 1338 (JA. 105).[10] The majority took this

9 A copy of Johnson's motion seeking to vacate his 1963 conviction was annexed as Exhibit L to his Mississippi motion for post-conviction relief (JA. 90).

10 The majority said it would not decide whether "a prior conviction can be used as an aggravating circumstance if that conviction is subsequently reversed *on direct appeal*." 511 So. 2d at 1338 (JA. 105) (emphasis added). As pointed out in the *amicus* brief of the Attorney General of the State of New York in support of Johnson's petition for

position because, "[i]f we adopted Johnson's argument, the state could never use a conviction as an aggravating circumstance, because of the *extreme likelihood* that a foreign state could overturn the prior conviction through collateral attack." 511 So. 2d at 1338 (JA. 105) (emphasis added). The majority also suggested—citing nothing in the record—that the decision of the New York Court of Appeals was not controlling on the Mississippi courts because the New York proceedings did not appear to be "truly adversarial." 511 So. 2d at 1338 (JA. 105). It went on to say that "the state's attorney in New York had no significant interest or concern in vouchsafing the validity of [the] 1963 conviction" (*id.*), and that it was Mississippi, not New York, that "had the greatest interest in upholding the validity of [the] New York conviction" (*id.*).

The majority also held that Johnson's claim was procedurally barred because:

> "At no time during his direct appeal, or in his petition for certiorari to the U.S. Supreme Court did [Johnson] argue his New York conviction was constitutionally invalid. Moreover, there is nothing to suggest he took any steps to vacate this conviction until he filed this petition." 511 So. 2d at 1337 (JA. 102).

No requirement of any such proceedings had existed in Mississippi jurisprudence before it was announced for the first time in this case. Furthermore, as the New York Court of Appeals expressly found, Johnson had made at least three *pro se* efforts to challenge the validity of his 1963 conviction (JA. 96; 126).

Three justices of the Mississippi Supreme Court dissented, arguing that where a prior conviction is "successfully" and "vigorously" argued by the prosecution as an aggravating circumstance, resentencing is required "should the prior conviction ultimately be set aside." 511 So. 2d at 1344 (JA. 114; 118). They criticized the majority for giving the decision of the New York Court of Appeals "less than full faith and credit," 511 So. 2d at 1343 (JA. 117), and argued that the invalidation of Johnson's 1963 conviction "undermines confidence in the outcome of the penalty phase of his capital murder trial." 511 So. 2d at 1345 (JA. 121). The dissenters also argued that Johnson's claim was not procedurally barred, because under Mississippi law, he could not have sought relief until he "obtained the order of March 24, 1987 vacating his 1963 New York conviction." 511 So. 2d at 1343 (JA. 115).

---

certiorari (at 13), Johnson's conviction *was* reversed by the New York Court of Appeals on direct appeal. Under Mississippi law, the appropriate relief for denial of a direct appeal is also to grant an out-of-time appeal. *See, e.g., Williams v. State*, 456 So. 2d 1042 (Miss. 1984).

SUMMARY OF ARGUMENT

1. This Court has never held that, consistent with the Full Faith and Credit Clause, a state may use a prior conviction in a sister state to enhance a criminal sentence—much less to put a defendant to death—and at the same time refuse to recognize a subsequent decision by the sister state vacating the same conviction. While the Full Faith and Credit Clause does not require a state to use an out-of-state conviction for enhancement, it does require that a state which does so must recognize a subsequent decision by the sister state to vacate that conviction on constitutional grounds. Mississippi's refusal to recognize the 1987 vacatur on grounds insulting to the New York Court of Appeals is a plain affront to the Full Faith and Credit Clause.

2. The judgment below should be reversed because the Mississippi Supreme Court did not follow this Court's decisions in *Burgett* v. *Texas*, 389 U.S. 109 (1967), *Townsend* v. *Burke*, 334 U.S. 736 (1948), and *United States* v. *Tucker*, 404 U.S. 443 (1972). *Burgett* holds that a constitutionally infirm conviction is inadmissible to enhance punishment for another offense. *Tucker* and *Townsend* hold that where a sentencer relied on an invalid prior conviction or other "misinformation" of constitutional magnitude, the sentence must be set aside. Nothing in *Zant* v. *Stephens*, 462 U.S. 862 (1983), requires a contrary result in a death case. *Zant* expressly distinguished the situation

presented here, in which constitutionally impermissible evidence is made the basis for a death sentence through the vehicle of an aggravating circumstance supported solely by such inadmissible and highly prejudicial evidence. In Johnson's case, the statutory aggravating circumstance of a prior violent felony was supported only by evidence of an unconstitutional and now vacated conviction. The jury was directed to weigh that conviction in the balance when it decided whether to impose the death penalty. The introduction of such evidence at a capital sentencing proceeding cannot be harmless error, and the Mississippi Supreme Court expressly declined to rest its decision on harmless error grounds. 511 So. 2d at 1338 (JA. 104).

3. Johnson's claim is not procedurally barred. The procedural requirement invoked by the majority below had not been previously announced, is inconsistent with the plain terms of *Phillips* v. *State*, 421 So. 2d 476, 481-82 (Miss. 1982), and has not been followed by the Mississippi Supreme Court in any case but Johnson's. A state procedural rule that is applied without notice and is not regularly followed cannot bar review of federal constitutional claims. Under Mississippi law, a defendant seeking to challenge the validity of an out-of-state conviction used to enhance a Mississippi sentence must first succeed in setting aside the challenged conviction in the jurisdiction where it was entered *before* requesting relief in Mississippi. That is exactly what Johnson did here.

ARGUMENT

I.

THE REFUSAL OF THE MISSISSIPPI SUPREME COURT TO RECOGNIZE THE JUDGMENT OF THE NEW YORK COURT OF APPEALS VACATING PETITIONER'S 1963 NEW YORK CONVICTION VIOLATES THE FULL FAITH AND CREDIT CLAUSE OF THE CONSTITUTION

The Full Faith and Credit Clause of the Constitution, U.S. Const. Art. IV, § 1, obligated the Mississippi Supreme Court to recognize and respect the decision of the New York Court of Appeals vacating Johnson's 1963 conviction, but the Mississippi court explicitly refused to do so. It held that "a foreign state cannot vitiate the death penalty verdict in this state by setting aside a prior conviction of a violent crime through a collateral relief petition." 511 So. 2d at 1338 (JA. 105). The plain implication of that holding is that the Mississippi Supreme Court treated the New York Court of Appeals' decision differently from how it would have treated its own decision invalidating a Mississippi conviction on constitutional grounds and differently from how it would have been treated by New York. This alone violates the Full Faith and Credit Clause and requires reversal.

"The concept of full faith and credit is central to our system of jurisprudence." *Underwriters National Assurance Co.* v. *North Carolina Life & Accident & Health Insurance Guaranty Ass'n*, 455 U.S. 691, 703 (1984). The principle that a state must recognize and respect its sister states' decisions gained recognition as early as 1644 when the Confederation of New England Colonies recommended that the verdict or sentence of any court within the colonies be accorded the same force and esteem by the other colonies' courts as it would have received in the courts of the rendering colony. Nadelmann, *Full Faith and Credit to Judgments and Public Acts*, 56 Mich. L. Rev. 33, 38 (1957). The Founders included a full faith and credit provision in the

Articles of Confederation, *id.* at 34-35, and broadened its scope in the Federal Constitution.[11]

Justice Jackson articulated the importance of full faith and credit to the newly-developed system of federalism:

> "By the full faith and credit clause, [the Founders] sought to federalize the separate and independent state legal systems by the overriding principle of reciprocal recognition of public acts, records, and judicial proceedings. It was placed foremost among those measures which would guard the new political and economic union against the disintegrating influence of provincialism in jurisprudence, but without aggrandizement of federal power at the expense of the states." Jackson, *Full Faith and Credit, The Lawyer's Clause of the Constitution*, 45 Colum. L. Rev. 1, 17 (1945) (citations omitted).

See also Morris v. *Jones*, 329 U.S. 545, 553 (1947).

This Court has uniformly required that a forum state lend "the same credit, validity, and effect" to a judgment as would "the state where it was pronounced." *Underwriters National Assurance Co.* v. *North Carolina Guaranty Ass'n*, *supra*, 455 U.S. at 704 (quoting *Hampton* v. *McConnell*, 16 U.S. (3 Wheat.) 234, 235 (1818) (Marshall, C.J.)). "[J]udgments within the jurisdiction of the rendering state [are entitled to] the same faith and credit in sister states as they have in the state of the original forum." *Johnson* v. *Muelberger*, 340 U.S. 581, 584 (1951) (footnote omitted).

The repeated errors made by the Mississippi Supreme Court in construing New York law and reviewing New York proceedings demonstrate the importance of the policies underlying the Full Faith and Credit Clause. As the *amicus curiae* brief of the

---

11 *See* Costigan, *The History of the Adoption of Section I of Article IV of the United States Constitution*, 4 Colum. L. Rev. 470, 471-74 (1904); Corwin, *The "Full Faith and Credit" Clause*, 81 U. Pa. L. Rev. 371, 373 (1933).

State of New York in support of the petition for certiorari points out, the Mississippi court erroneously believed that Johnson's 1963 conviction was "final" in New York, 511 So. 2d at 1339 (JA. 105), when in fact it was not final because his appeal had never been perfected pursuant to N.Y. Crim. Proc. Law § 460.10 (McKinney 1983) (N.Y. Att'y Gen. *Amicus* Br. 13-14). The Mississippi court erroneously believed that the conviction had been overturned on collateral review, 511 So. 2d at 1337-38 (JA. 105), when in fact it was reversed on direct appeal (N.Y. Att'y Gen. *Amicus* Br. 10-13). The Mississippi court erroneously believed that Johnson never sought to vacate the 1963 conviction until he filed his post-conviction relief petition in Mississippi, 511 So. 2d at 1337 (JA. 102), when in fact he had sought unsuccessfully on three separate occasions between 1967 and 1971 to raise the issues of the denial of his right to appeal and the *Huntley* violation which eventually prevailed in the New York Court of Appeals (N.Y. Att'y Gen. *Amicus* Br. 4).

Under New York law, reversal of the 1963 conviction rendered that conviction a nullity and all prior proceedings void *ab initio*. *People ex rel. Sloan* v. *Lawes*, 255 N.Y. 112, 117, 174 N.E. 80, 81 (1930); *Burrell* v. *McMann*, 51 Misc. 2d 185, 188, 273 N.Y.S.2d 9, 12 (Sup. Ct. Clinton Co. 1966). Mississippi was obliged by the Full Faith and Credit Clause to treat the New York reversal as New York would have treated that reversal.

The majority of the Mississippi Supreme Court attributed to the New York Court of Appeals a motive to "vitiate the death penalty verdict" in Mississippi. 511 So. 2d at 1338 (JA. 21). In its view, the New York proceeding "lacked an essential adversarial ingredient," 511 So. 2d at 1338-39 (JA. 106); the State of New York had no "significant interest" in upholding Johnson's New York conviction. 511 So. 2d at 1338 (JA. 105).

These accusations impugning the integrity of the New York judicial system are an affront to the Full Faith and Credit Clause. The Constitution demands "not some, but full credit" to sister-state determinations. *Davis* v. *Davis*, 305 U.S. 32, 40 (1938). *See also Johnson* v *Muelberger*, *supra*, 340 U.S. at 584. The Full Faith and Credit Clause

> "is not to be applied, accordion-like, to accommodate our personal predilections. It substituted a command for the earlier principles of comity and thus basically altered the status of the States as independent sovereigns . . . . It ordered submission by one State even to hostile policies reflected in the judgment of another State, because the practical question of the federal system, which the Constitution designed, demanded it." *Estin* v. *Estin*, 334 U.S. 541, 545-46 (1948) (citation omitted).

Accord Milwaukee County v. *M.E. White Co.*, 296 U.S. 268, 276-77 (1935).

It is not for Mississippi to inquire into the supposed motivations of the New York Court of Appeals and to deny recognition to the decisions of that court if it finds that they are wrongly motivated. The dictate of the Full Faith and Credit Clause is that sister-state judgments are presumptively valid and all inquiry into their merits is precluded. *Stute* v. *Duke*, 205 Kan. 37, 40-41, 468 P.2d 132, 135 (1970) (criminal foreign convictions have "a presumption in favor of . . . validity"); *Ex parte Wolfson*, 30 Cal. 2d 20, 31, 180 P.2d 326, 333 (1947) (even if out-of-state criminal "judgment were erroneous . . . it has been duly certified to us as the solemn judgment of a sister state, the jurisdiction of the court which rendered it is not questioned, and it is therefore entitled to full faith and credit"); *State* v. *Prince*, 64 Idaho 343, 348, 132 P.2d 146, 148 (1942) (Oregon's "judgment imports absolute verity and is final and conclusive"). A court "should assume that steps taken by a sister state to protect rights are accurate and in good faith." *Commonwealth ex rel. Marshall* v. *Gedney*, 478 Pa. 299, 311, 386 A.2d 942, 948 (1978) (Roberts, J., concurring). As this Court held in *Milliken* v. *Meyer*, 311 U.S. 457, 462 (1940):

> "[I]f the judgment on its face appears to be a 'record of a court of general jurisdiction, such jurisdiction over the cause and the parties is to be presumed unless disproved by extrinsic evidence or by the record itself.' In such case the full faith and credit clause of the Constitution precludes any inquiry into the merits of the cause of action, the logic

> or consistency of the decision, or validity of the legal principles on which the judgment is based. . . . Whatever mistakes of law may underlie the judgment, it is 'conclusive as to all the *media concludendi*.' " (citations omitted)[12]

In *United States ex rel. Savini* v. *Jackson*, 250 F.2d 349 (2d Cir. 1957), the defendant's enhanced sentence under the New York Multiple Offender Law was based upon an earlier Michigan conviction which was later held to be unconstitutional. The Second Circuit held that the defendant was entitled to be resentenced:

> "To the extent that any State makes its penal sanctions depend in part on the fact of prior convictions elsewhere, necessarily it must assume the burden of meeting attacks on the constitutionality of such prior convictions. Constitutional guarantees should not be shorn of their vitality merely to facilitate the administration of a penal policy whereby the sentence on one conviction depends in part on a prior conviction." 250 F.2d at 355.

Other courts have recognized that the constitutional command of full faith and credit extends to subsequent reversals of criminal judgments. In *People* v. *Willis*, 79 A.D.2d 1036, 1037,

---

12 While it is a truism that the Full Faith and Credit Clause does not require a state to enforce a foreign penal judgment, this exception has no application here. Johnson did not ask Mississippi to enforce New York's penal law. Johnson asked Mississippi only to recognize that his 1963 New York conviction had been reversed and no longer provided any basis for use as the aggravating circumstance. In this context the Full Faith and Credit Clause applies; a state must *recognize* a foreign state's criminal judgments. *Wisconsin* v. *Pelican Insurance Co.*, 127 U.S. 265, 291-92 (1888). *See also Farmland Dairies* v. *Barber*, 65 N.Y.2d 51, 55-56, 478 N.E.2d 1314, 1316-17, 489 N.Y.S.2d 713, 715-16 (1985); *State* v. *Johnston*, 17 Wash. App. 486, 497, 564 P.2d 1159, 1166 (1977); *Hill* v. *Blake*, 186 Conn. 404, 410-11, 441 A.2d 841, 845 (1982); *Bennett* v. *State*, 476 S.W.2d 281, 283 (Tex. Crim. App. 1972); *Ex parte Wolfson*, *supra*, 30 Cal. 2d at 31, 180 P.2d at 333.

435 N.Y.S.2d 38, 39 (2d Dep't 1981), the court held that New York must recognize the dismissal of a Texas indictment entered after New York had sentenced the defendant as a second felony offender and granted defendant's motion to vacate the New York sentence. In *Kellogg* v. *State*, 504 P.2d 440, 442 (Okla. Ct. Crim. App. 1972), the court stated that under the Full Faith and Credit Clause "Oklahoma could not choose to recognize one act of the sister-state, the conviction, and then ignore its subsequent act which nullified the conviction." *See also People* v. *Terry*, 61 Cal. 2d 137, 148, 390 P.2d 381, 388, 37 Cal. Rptr. 605, 612, *cert. denied*, 379 U.S. 866 (1964) (reversing California death sentence where sentencing court relied on Oklahoma conviction that was later pardoned: California "must give an administrative decision of Oklahoma, represented here by the pardon, the same effect in California as that decision would have borne in Oklahoma") (footnote omitted). There is simply no room for a more niggardly view of the respect which Mississippi owes to the judicial judgments of New York under the Full Faith and Credit Clause.

II.

THE DEATH PENALTY MAY NOT BE CONSTITUTIONALLY IMPOSED WHERE THE PRINCIPAL EVIDENCE RELIED ON AT SENTENCING IS A PRIOR CONVICTION LATER HELD TO BE UNCONSTITUTIONAL

The jury that sentenced Samuel Johnson to death would have seen him very differently had it not been told repeatedly that he was convicted in 1963 of "second degree assault with intent to commit first-degree rape"—an invalid conviction for a peculiarly inflammatory crime.[13] The Mississippi prosecutor offered

13 Rape is "inherently one of the most egregiously brutal acts one human being can inflict upon another . . . ." *Coker* v. *Georgia*, 433 U.S. 584, 607-08 (1977) (Burger, C.J. and Rehnquist, J., dissenting). The crime has historically been treated with special severity when committed by a black man, *see Furman* v. *Georgia*, 408 U.S. 238, 364 (1972) (Marshall, J., concurring) (405 of 455 men executed for rape between 1930 and 1968 were black), particularly in the Southern states, *see* L. Baughman, *Southern Rape Complex* (1966); C. Hernton, *Sex and Racism in America* (1965).

no evidence of any other violent felony conviction. The prosecutor's many references to the invalid 1963 conviction put before the jury a critical, erroneous consideration that could not have failed to weigh heavily in its ultimate decision that Johnson should die.[14] The invalid conviction was used to prove an aggravating circumstance that the jury expressly relied upon in its sentencing determination, and, as the Mississippi Supreme Court itself acknowledged, there is no way to know whether the jury would have returned a death sentence without it.

A. The Eighth and Fourteenth Amendments Require Death Sentences To Be Based on Reliable Information

The function of aggravating circumstances in a capital sentencing scheme is to "satisfy the concerns of *Furman*" by providing a " 'meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.' " *Gregg* v. *Georgia*, 428 U.S. 153, 198 (1976) (plurality opinion) (quoting *Furman* v. *Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring)); *see also Godfrey* v. *Georgia*, 446 U.S. 420, 427-28 (1980). Because the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed," *Lockett* v. *Ohio*, 438 U.S. 586, 604 (1978), the facts used to es-

14 The leading study of jury behavior concludes that a jury is substantially more likely to convict a defendant if it knows that he has a prior conviction. H. Kalven & H. Zeisel. *The American Jury* 127-30, 177-80 (1966). *See also* Cornish & Sealy, *Juries and the Rules of Evidence* [London School of Economics Jury Project], [1973] Crim. L. Rev. 208, 210. *Cf. Boyd* v. *United States*, 142 U.S. 450, 458 (1892) (Harlan, J.) (proof of prior crimes "only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value to the community, and who were not entitled to the full benefit of the rules prescribed by law for the trial of human beings charged with the crime involving the punishment of death").

tablish aggravating circumstances must themselves be determined in a reliable manner. That is why the Court has "invalidated prodedural rules that tended to diminish the reliability of the sentencing determination," *Beck* v. *Alabama*, 447 U.S. 625, 638 (1980) (footnote omitted); *see also Caldwell* v. *Mississippi*, 472 U.S. 320, 328-30 (1985), and has reversed death sentences where facts offered in aggravation were not subject to adequate adversary testing. *See, e.g., Gardner* v. *Florida*, 430 U.S. 349 (1977); *Ake* v. *Oklahoma*, 470 U.S. 68, 83-84 (1985). Procedures for determining aggravating circumstances must respect the basic premises of the Anglo-American system of adversary criminal justice such as those embodied in the Fifth Amendment privilege against self-incrimination and the Sixth Amendment right to counsel. *Estelle* v. *Smith*, 451 U.S. 454 (1981).

Apart from the commission and circumstances of the murder, the sole fact about Samuel Johnson's life that Mississippi law defined as an aggravating circumstance was that he had previously perpetrated another violent crime. The prosecutor hammered on this fact repeatedly in calling for the death sentence, and the jury found it and explicitly weighed it in the balance when sentencing Johnson to die. However, the only basis for concluding that Johnson had committed another violent crime—his 1963 conviction in the courts of New York—was voided by those courts because of unresolvable doubts as to whether the conviction was obtained through the procedure declared unconstitutional in *Jackson* v. *Denno*, 378 U.S. 368 (1964), and because Johnson was denied his right to counsel on appeal, vouchsafed by *Douglas* v. *California*, 372 U.S. 353 (1963). *Jackson* explicitly held that the procedure in effect in New York State when Johnson was tried in Monroe County in 1963 "poses substantial threats to a defendant's constitutional rights to have an involuntary confession entirely disregarded and to have the coercion issue fairly and reliably determined."

378 U.S. at 389.[15] And *Douglas* stands to assure against the risk that an unreviewed criminal judgment is " 'infect[ed] . . . with the clear danger of convicting the innocent.' " *Stovall* v. *Denno*, 388 U.S. 293, 298 (1967) (quoting *Tehan* v. *Shott*, 382 U.S. 406, 416 (1966)).[16]

Resentencing is required just as it was in *United States* v. *Tucker*, *supra*, by the principles of *Townsend* v. *Burke*, *supra*, and *Burgett* v. *Texas*, *supra*. These principles require that, "even in a noncapital sentencing proceeding, the sentence must be set aside if the trial court relied at least in part on 'misinformation of constitutional magnitude' such as prior uncounseled convictions that were unconstitutionally imposed." *Zant* v. *Stephens*, *supra*, 462 U.S. at 887 n.23.

B. Reliance on a Subsequently Invalidated Prior Conviction at Sentencing in a Capital Case Requires Resentencing

In *Burgett* v. *Texas*, *supra*, the Court held that "[t]o permit a conviction obtained in violation of *Gideon* v. *Wainwright* [, 372

---

15 Of course, "*any* criminal trial use against a defendant of his *involuntary* statement is a violation of due process of law." *Mincey* v. *Arizona*, 437 U.S. 385, 398 (1978) (emphasis in original).

In *Martinez* v. *Estelle*, 612 F.2d 173 (5th Cir. 1980), the court considered the use of a prior robbery conviction to enhance a sentence. The defendant alleged that the conviction had been secured by use of a coerced confession. The Fifth Circuit held:

> "If the confession was not voluntarily given the robbery conviction is void. A void conviction may not be used to enhance an individual's sentence . . . ."

Id. at 175 (citing *Burgett* v. *Texas*, *supra*, 389 U.S. at 112-13).

16 The denial of Johnson's right to counsel on appeal violated both the federal Constitution, *Evitts* v. *Lucey*, 469 U.S. 387 (1985), and New York law. *People* v. *Montgomery*, 24 N.Y.2d 130, 247 N.E.2d 130, 299 N.Y.S.2d 156 (1969). The admission of his 1963 conviction tainted by the violation of these rights was "inherently prejudicial," as in *Burgett* v. *Texas*, *supra*, 389 U.S. at 115, because the denial of the right to appellate counsel implicates the same constitutional concerns

U.S. 335 (1963)] to be used against a person either to support guilt or enhance punishment for another offense . . . is to erode the principle of that case. . . . [T]he accused in effect suffers anew from the deprivation of that Sixth Amendment right." 389 U.S. at 115. *Burgett* was followed in *United States* v. *Tucker*, *supra*, where the trial judge specifically considered the defendant's three previous convictions before sentencing him for armed robbery in 1953. Two of those three convictions—a 1938 Florida conviction and a 1946 Louisiana conviction—were later held to be unconstitutional under *Gideon* v. *Wainwright*, *supra*, by a California state court. This Court held that it was error for the sentencing judge to have considered the defendant's invalid convictions and remanded for resentencing without reference to the unconstitutional convictions.

The basis for the *Tucker* holding was that the defendant's sentence was "founded at least in part upon misinformation of constitutional magnitude," 404 U.S. at 447, and that but for his unconstitutional prior convictions, "the factual circumstances of [Tucker's] background would have appeared in a dramatically different light at the sentencing proceeding." 404 U.S. at 448. Rejecting the argument that Tucker had not shown that he was not guilty of the earlier crimes, the Court said:

> "We need not speculate about whether the outcome of the respondent's 1938 and 1946 prosecutions would necessarily have been different if he had had the help of a lawyer. Such speculation is not only fruitless, but quite beside the point. For the real question here is not whether the results of the Florida and Louisiana proceedings might have been different if the respondent had had counsel, but whether the sentence in the 1953 federal case might have been different if the sentencing judge had known that at least two of the respondent's previous convictions had been unconstitutionally obtained." 404 U.S. at 447-48 (footnotes omitted).

as *Gideon* v. *Wainwright*, 372 U.S. 335 (1963). Indeed, "the promise of *Douglas* that a criminal defendant has a right to counsel on appeal [is] . . . like the promise of *Gideon* that a criminal defendant has a right to counsel at trial." *Evitts* v. *Lucey*, *supra*, 469 U.S. at 397.

In *Loper* v. *Beto*, 405 U.S. 473, 482 (1972), the Court noted that the "*Tucker* case involved . . . that aspect of *Burgett* that prohibits the use of invalid prior convictions to 'enhance punishment.' " While *Burgett* dealt with a denial of the right to counsel, the Court there indicated that the result would be the same in the case of convictions obtained in violation of other fundamental constitutional rights, such as coerced confessions and denial of the right of confrontation. 389 U.S. at 114.

In *Townsend* v. *Burke*, *supra*, the Court held that a conviction and sentence would be vacated where the defendant "was sentenced on the basis of assumptions concerning his criminal record which were materially untrue." There, the sentencing court considered the defendant's numerous prior convictions, but it attributed to him three convictions for crimes of which he had been acquitted. The Court held that "[s]uch a result, whether caused by carelessness or design, is inconsistent with due process of law, and such a conviction cannot stand." 334 U.S. at 741.[17]

17 At least seven courts of appeals have invalidated sentences where there was a subsequent reversal of a prior conviction relied on at sentencing. *United States* v. *Walters*, 526 F.2d 359 (3d Cir. 1975); *Bourgeois* v. *Whitley*, 784 F.2d 718 (5th Cir. 1986); *Walker* v. *United States*, 636 F.2d 1138 (6th Cir. 1981); *United States* v. *Hubbard*, 618 F.2d 422 (7th Cir. 1980) (*per curiam*); *Taylor* v. *United States*, 472 F.2d 1178 (8th Cir. 1973) (*per curiam*); *Leano* v. *United States*, 494 F.2d 361 (9th Cir. 1974); *Martinez* v. *United States*, 464 F.2d 1289 (10th Cir. 1972). The remaining five courts of appeals have all applied the *Tucker-Townsend* rule to condemn sentences based on other material misinformation or false assumptions regarding a defendant's prior record. *United States* v. *Picard*, 464 F.2d 215 (1st Cir. 1972); *United States* v. *Malcolm*, 432 F.2d 809 (2d Cir. 1970); *Baker* v. *United States*, 388 F.2d 931 (4th Cir. 1968); *United States* v. *Satterfield*, 743 F.2d 827 (11th Cir. 1984), *cert. denied*, 471 U.S. 1117 (1985); *United States* v. *Lemon*, 723 F.2d 922 (D.C. Cir. 1983).

That Johnson's 1963 conviction was invalidated by the New York courts after his Mississippi trial, not before, makes no difference. *See United States* v. *Tucker*, *supra*, 404 U.S. at 444-45. Mississippi does not permit its courts to entertain contentions of the invalidity of out-of-state prior convictions offered as the basis for enhanced sentencing, but instead remits the defendant to post-conviction remedies first "in the state in which such conviction occurred" and then—if and after the out-of-state conviction is invalidated—by post-conviction challenge to the Mississippi sentence through a "petition for writ of error *coram nobis*." *Phillips* v. *State*, *supra*, 421 So. 2d at 482. If Mississippi permitted defendants to challenge out-of-state prior convictions in its courts at the time they are used for sentencing purposes, it could possibly bind them to the outcome of whatever determination resulted from those challenges. But Mississippi cannot decline to entertain such challenges at its own trials, send defendants back to the courts of the conviction state to make them, and then refuse to recognize the decisions of those courts as coming too late.

C. Unconstitutional Evidence Weighed by a Jury Cannot Support a Death Sentence

Zant v. *Stephens*, *supra*, in no way conflicts with the principles of *Burgett*, *Tucker* and *Townsend*, but rather embraces them. Writing for the Court, Justice Stevens stated:

> "As we held in *United States* v. *Tucker*, 404 U.S. 443, 447-449 (1972), even in a noncapital sentencing proceeding, the sentence must be set aside if the trial court relied at least in part on 'misinformation of constitutional magnitude' such as prior uncounseled convictions that were unconstitutionally imposed. See *Townsend* v. *Burke*, 334 U.S. 736, 740-741 (1948) (reversing a sentence imposed on uncounseled defendant because it was based on 'extensively and materially false' assumptions concerning the defendant's prior criminal record)." 462 U.S. at 887 n.23.

The current Chief Justice, concurring, agreed that "a more careful application of [the *Tucker-Townsend* rule] is appropriate in capital cases." *Id.* at 903.

In *Zant*, the defendant was convicted of capital murder and sentenced to death by a Georgia jury. At the sentencing phase the jury found three aggravating circumstances, one of which was held in a later case to be too vague for constitutional enforcement.[18] Nevertheless, all of the evidence relied upon at sentencing to prove this aggravating circumstance was "fully admissible," 462 U.S. at 886, and the jury had not been instructed to weigh aggravating circumstances against mitigating circumstances.

This Court held that where an invalid aggravating circumstance is found by a capital sentencing jury, but where the circumstance is neither weighed by the jury in the ultimate life-or-death decision nor supported by constitutionally inadmissible evidence, reversal of a death sentence is not thereby required. In so ruling, however, the Court was at pains to point out that the submission of an invalid aggravating circumstance to the jury in that case did not result in the introduction of any evidence that would otherwise have been excluded from the jury's consideration in sentencing. 462 U.S. at 886-88. *See also Barclay* v. *Florida*, 463 U.S. 939, 956 (1983). Specifically, there was no contention in *Zant* (or in *Barclay*) that "the jury's finding of an aggravating circumstance relied on materially inaccurate or misleading information." 462 U.S. at 887 n.24.[19] In

---

18 The Georgia Supreme Court held the aggravating circumstance of "a substantial history of serious assaultive criminal convictions" to be unconstitutionally vague. *Arnold* v. *State*, 236 Ga. 534, 539-42, 224 S.E.2d 386, 391-92 (1976).

19 In *Smith* v. *Murray*, 106 S. Ct. 2661 (1986) (to be officially reported at 477 U.S. 527), the majority found it unnecessary to reach the issue reserved by *Zant*. The four members of the Court who did reach the issue said:

> "We did not conclude [in *Zant*] . . . that any evidence concerning the invalid circumstance was simply irrelevant because the valid cir-

addition, the invalid aggravating circumstance in *Zant* was rendered harmless because "[u]nder Georgia's sentencing scheme, and under the trial judge's instructions in [the *Zant*] case, no suggestion is made that the presence of more than one aggravating circumstance should be given special weight." 462 U.S. at 891.[20]

This case presents the opposite situation distinguished in *Zant*: one in which the challenged aggravating circumstance *was* the vehicle for introducing inadmissible and strongly prejudicial evidence, and where the "jury [was] . . . specifically instructed to weigh . . . aggravating and mitigating circumstances in exercising its discretion whether to impose the death penalty." *Id.* at 890.[21]

---

cumstances were, in all events, sufficient to support the death penalty. The fact that the record adequately establishes one valid aggravating circumstance may make the defendant eligible for the death penalty but it does not justify the conclusion that a death sentence should stand even though highly prejudicial inadmissible evidence was presented to the jury at the sentencing hearing. The introduction of such highly prejudicial, inadmissible evidence—evidence that itself represents an independent constitutional violation—quite clearly undermines the validity of the capital sentencing proceeding and violates the Eighth Amendment." *Id.* at 2677 (Stevens, J., dissenting).

20 The *Zant* opinion stated that it did "not express any opinion concerning the possible significance of a holding that a particular aggravating circumstance is 'invalid' under a statutory scheme in which the judge or jury is specifically instructed to weigh statutory aggravating and mitigating circumstances in exercising its discretion whether to impose the death penalty." 462 U.S. at 890.

21 In *Barclay* v. *Florida*, *supra*, where the sentencer also weighed aggravating against mitigating evidence, the Florida Supreme Court was permitted to find that on the facts of the case the sentencer's consideration of an invalid aggravating circumstance was harmless error. 463 U.S. at 958. *See also Wainwright* v. *Goode*, 464 U.S. 78 (1983) (*per curiam*). The Mississippi Supreme Court in the present case explicitly "eschew[ed] 'harmless error' in [its] . . . reasoning . . . because the district attorney argued this particular aggravating circumstance as a reason to impose the death penalty." 511 So. 2d at 1338 (JA. 104).

III.

PETITIONER'S CLAIMS ARE NOT PROCEDURALLY BARRED

A majority of the Mississippi Supreme Court held that, because Johnson did not challenge the validity of his 1963 conviction on direct appeal, he was "procedurally barred" under the Mississippi Uniform Post-Conviction Collateral Relief Act, Miss. Code Ann. § 99-39-21 (Supp. 1987), and could not seek relief from his death sentence after the New York Court of Appeals reversed that conviction in 1987. 511 So. 2d at 1337 (JA. 102).

At the time of Johnson's trial and direct appeal, however, Mississippi law specifically required that, in order to attack an out-of-state conviction used to enhance a Mississippi sentence, a defendant had to bring a proceeding "in the state in which such conviction occurred, pursuant to that state's established procedures. Should such proceeding in the foreign state succeed in overturning the conviction, then relief [was to] . . . be sought in Mississippi by petition for writ of error *coram nobis*." *Phillips* v. *State*, *supra*, 421 So. 2d at 482. The *Phillips* rule has been held to apply to death cases. *Nixon* v. *State*, ____ So. 2d ____, DP-65, Slip Op. at 33 (Miss. Nov. 25, 1987).

Because of the *Phillips* rule, the court that tried Johnson for capital murder could *not* have considered the validity of his 1963 conviction when Johnson was sentenced in 1982.[22] The

---

22 In *Bandy* v. *State*, 495 So. 2d 486 (Miss. 1986), the defendant was indicted and tried for child molesting and sentenced as a habitual offender to life imprisonment. At trial the prosecution introduced two prior convictions—one in Texas and the other in Iowa—to show that the defendant had previously been convicted of crimes of violence; without proof of at least one prior violent conviction the defendant could not have been sentenced as a habitual offender. The defendant sought to challenge the constitutionality of the two prior convictions on direct appeal. Relying on *Phillips*, the Mississippi Supreme Court held that the constitutionality of a prior conviction used to enhance a Mississippi sentence *cannot* be raised on direct appeal, but can be challenged only in a separate proceeding for post-conviction relief. That

Mississippi Supreme Court would *not* have considered the validity of the 1963 conviction on Johnson's direct appeal in 1984 because *Phillips* expressly requires that relief from enhanced sentences must be sought by petition for a writ of error *coram nobis*, not on direct appeal. 421 So. 2d at 482.[23] As Justice Robertson pointed out in dissent below, any challenge by Johnson to the constitutionality of his New York 1963 conviction on direct appeal would have been "dismissed . . . out of hand" under the Mississippi precedents. 511 So. 2d at 1343 (JA. 115).

State procedural-bar rules cannot be invoked to preclude consideration of federal constitutional rights unless those rules "were clearly announced to defendant and counsel" and regularly followed at the time of his trial or appeal. *Henry* v. *Mississippi*, 379 U.S. 443, 448 n.3 (1965).[24] A procedural bar is valid

court has also held that Mississippi's "habitual offender sentencing procedure resembles in all relevant respects the sentencing phase of capital crimes." *DeBussi* v. *State*, 453 So. 2d 1030, 1032 (Miss. 1984).

23 The Mississippi Supreme Court could not have decided the validity of Johnson's 1963 conviction on direct appeal without a record, but *Phillips* holds that the trial court is not to hear witnesses—or to receive trial transcripts—relating to an out-of-state conviction. Where an issue is raised that cannot be decided except by reference to facts outside the trial record, the proper remedy under Mississippi law is post-conviction relief. *In re Petition of Broom*, 251 Miss. 25, 32-33, 168 So. 2d 44, 48 (1964) (*coram nobis*). *See also Tobias* v. *State*, 505 So. 2d 1014, 1015 (Miss. 1987); *Odom* v. *State*, 483 So. 2d 343, 344 (Miss. 1986).

24 *See also James* v. *Kentucky*, 466 U.S. 341, 348-49 (1984) (only state procedural rules which are "firmly established and regularly followed . . . can prevent implementation of federal constitutional rights"); *NAACP* v. *Alabama ex rel. Flowers*, 377 U.S. 288, 301 (1964) (" '[n]ovelty in procedural requirements cannot be permitted to thwart review by this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights' ") (quoting *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 457-58 (1958)); *Granviel* v. *Estelle*, 655 F.2d 673, 679 (5th Cir. 1981), *cert. denied*, 455 U.S. 1003, 1007 (1982) ("[w]e cannot enforce against Granviel a contemporaneous objection rule that

only if regularly applied to all litigants. *Hathorn* v. *Lovorn*, 457 U.S. 255, 263 (1982) ("State courts may not avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly to all similar claims").

The bar that a majority of the Mississippi Supreme Court invoked against Johnson fails conspicuously to meet these basic requirements. It was first announced in the course of denying Johnson the relief which it purportedly forecloses, and it has never been applied to other litigants, let alone regularly followed. In *Wheat* v. *Thigpen*, 793 F.2d 621, 625 n.3 (5th Cir. 1986), *cert. denied*, 107 S. Ct. 1566 (1987), the Fifth Circuit exhaustively reviewed Mississippi's invocation of procedural bars in death cases and found that the Mississippi court has "repeatedly ignored its rule prohibiting the raising of claims for the first time on writ of error *coram nobis*, if in fact the rule existed."

In fact, in 1984 when Johnson took his direct appeal, Mississippi regularly addressed issues raised for the first time on post-conviction relief. In *Smith* v. *State*, 477 So. 2d 191 (Miss. 1985), the defendant was convicted of burglary and sentenced to life imprisonment as a habitual offender. Although he had not raised any claim with respect to the validity of his enhanced sentence on direct appeal, he later sought post-conviction relief, claiming he did not know he could receive a life sentence under the statute charged in the indictment. The Mississippi Supreme Court held that his claim was not procedurally barred, even though not raised on direct appeal:

> "[T]his Court has previously held that errors affecting *fundamental rights* are exceptions to the rule that ques-

apparently did not even exist at the time of his trial"); *Wheat* v. *Thigpen*, 793 F.2d 621, 625 (5th Cir. 1986), *cert. denied*, 107 S. Ct. 1566 (1987) ("[i]f the state does not clearly announce the procedural rule or the state courts do not strictly or regularly follow the procedural rule, then the federal courts may reach the issue the state court refused to address").

tions not raised in the trial court cannot be raised for the first time on appeal. *Read* v. *State*, 430 So. 2d 832 (Miss. 1983); *Brooks* v. *State*, 209 Miss. 150, 46 So. 2d 94 (1950). It is noted that in the case sub judice that the defense counsel failed to raise the sentence issue on appeal, but that this defendant is raising the issue in his pro se post-conviction motion to correct sentence. . . . *The comparison of a seven year sentence, as opposed to a life sentence, without probation or parole is too significant a deprivation of liberty to be subjected to a procedural bar.*" 477 So. 2d at 195 (emphasis added).

Compare Woodson v. *North Carolina*, 428 U.S. 280, 305 (1976) ("Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two"). Even if the procedures set forth in *Phillips* had not specifically directed Johnson to proceed exactly as he did, the rule in *Smith* would preclude the application of a procedural bar to his claim. *Henry* v. *Mississippi*, *supra*, 379 U.S. at 449 n.5; *Williams* v. *Georgia*, 349 U.S. 375, 383-84 (1955).

CONCLUSION

The judgment of the Supreme Court of Mississippi should be reversed, and petitioner's death sentence should be vacated.

Dated: New York, New York
February 25, 1988

Respectfully submitted,

CLIVE A. STAFFORD SMITH
SOUTHERN PRISONERS'
DEFENSE COMMITTEE
185 Walton Street, N.W.
Atlanta, Georgia 30303
(404) 688-1202

LAURENCE T. SORKIN*
MARSHALL COX
ANTHONY PADUANO
CAHILL GORDON & REINDEL
(a partnership including
professional corporations)
80 Pine Street
New York, New York 10005
(212) 701-3000

Attorneys for Petitioner
Samuel Bice Johnson

**Counsel of Record*

STATUTORY APPENDIX

STATUTORY APPENDIX

U.S. Const. Art. IV, § 1:

Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.

U.S. Const. Amend. VIII:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. Amend. XIV, § 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 1738 (1982):

State and Territorial statutes and judicial proceedings; full faith and credit.

* * *

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court and that the said attestation is in proper form.

Such Acts, records, and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

Miss. Code Ann. § 97-3-19 (Supp. 1987):

Homicide; murder defined; capital murder.

* * *

(2) The killing of a human being without the authority of law by any means or in any manner shall be capital murder in the following cases:

(a) Murder which is perpetrated by killing a peace officer or fireman while such officer or fireman is acting in his official capacity or by reason of an act performed in his official capacity, and with knowledge that the victim was a peace officer or fireman. For purposes of this paragraph, the term "peace officer" means sheriffs of counties and their deputies, constables, marshals and policemen of cities and towns, game wardens, parole officers, a judge, prosecuting attorney or any other court official, agents of the alcoholic beverage control division of the state tax commission, agents of the bureau of narcotics, personnel of the Mississippi Highway Patrol, and the superintendent and his deputies, guards, officers and other employees of the Mississippi State Penitentiary;

(b) Murder which is perpetrated by a person who is under sentence of life imprisonment;

(c) Murder which is perpetrated by use or detonation of a bomb or explosive device;

(d) Murder which is perpetrated by any person who has been offered or has received anything of value for committing the murder, and all parties to such a murder, are guilty as principals;

(e) When done with or without any design to effect death, by any person engaged in the commission of the crime of rape, burglary, kidnapping, arson, robbery, sexual battery, unnatural intercourse with any child under the age of twelve (12), or nonconsensual unnatural intercourse with mankind, or in any attempt to commit such felonies;

(f) When done with or without any design to effect death, by any person engaged in the commission of the crime of felonious abuse and/or battery of a child in violation of subsection (2) of section 97-5-39, or in any attempt to commit such felony;

(g) Murder which is perpetrated by the killing of any elected official of a county, municipal, state or federal government with knowledge that the victim was such public official.

Miss. Code Ann. § 99-19-101 (Supp. 1987):

Jury to determine punishment in capital cases in separate sentencing proceeding; aggravating and mitigating circumstances to be considered.

(1) Upon conviction or adjudication of guilt of a defendant of capital murder or other capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. . . . In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitutions of the United States or of the State of Mississippi. The state and the defendant and/or his counsel shall be permitted to present arguments for or against the sentence of death.

(2) After hearing all the evidence, the jury shall deliberate on the following matters:

(a) Whether sufficient factors exist as enumerated in subsection (7) of this section;

(b) Whether sufficient aggravating circumstances exist as enumerated in subsection (5) of this section;

(c) Whether sufficient mitigating circumstances exist as enumerated in subsection (6) of this section, which outweigh the aggravating circumstances found to exist; and

(d) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) For the jury to impose a sentence of death, it must unanimously find in writing the following:

(a) That sufficient factors exist as enumerated in subsection (7) of this section;

(b) That sufficient aggravating circumstances exist as enumerated in subsection (5) of this section; and

(c) That there are insufficient mitigating circumstances, as enumerated in subsection (6), to outweigh the aggravating circumstances.

In each case in which the jury imposes the death sentence, the determination of the jury shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) of this section and upon the records of the trial and the sentencing proceedings. If the jury does not make the findings requiring the death sentence, the court shall impose a sentence of life imprisonment.

* * *

(5) Aggravating circumstances shall be limited to the following:

(a) The capital offense was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital offense or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital offense was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, aircraft piracy, sexual battery, unnatural intercourse with any child under the age of twelve (12), or nonconsensual unnatural intercourse with mankind, or felonious abuse and/or battery of a child in violation of subsection (2) of section 97-5-39, or the unlawful use or detonation of a bomb or explosive device.

(e) The capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital offense was committed for pecuniary gain.

(g) The capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital offense was especially heinous, atrocious or cruel.

(6) Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital offense committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

* * *

[redacted]

[redacted]

[redacted]

QUESTIONS PRESENTED

1. Whether the Mississippi Supreme Court's refusal to recognize the judgment of the New York Court of Appeals vacating petitioner's 1963 conviction violates the Full Faith and Credit Clause of the Constitution.

2. In a death case where the principal aggravating circumstance relied on at sentencing was a 20-year-old out-of-state conviction, does the subsequent invalidation of that conviction--when there was no other evidence to support that aggravating circumstance -- require petitioner to be resentenced?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED.....	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES.....	iii
OPINIONS BELOW.....	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	2
STATEMENT OF THE CASE.....	3
A. Substantive Facts.....	3
B. Procedural History.....	5
SUMMARY OF ARUGMENT.....	9
ARGUMENT	
A. THE REFUSAL OF THE MISSISSIPPI SUPREME COURT TO SET ASIDE THE DEATH SENTENCE IMPOSED ON PETITIONER AFTER THE NEW YORK COURT OF APPEALS VACATED A 1963 CONVICTION DID NOT VIOLATE THE FULL FAITH AND CREDIT CLAUSE OF THE UNITED STATES CONSTITUTION.....	11

B. WHERE AGGRAVATING CIRCUMSTANCES AS USED IN MISSISSIPI ARE A MATTER OF STATE LAW AND DO NOT IMPLICATE THE FEDERAL CONSTITUTION. THERE EXIST NO GROUNDS UPON WHICH TO VACATE THE DEATH SENTENCE IN THIS CASE.....	18
C. THE PROCEDURAL BAR.....	45
CONCLUSION.....	55
CERTIFICATE OF SERVICE.....	57

TABLE OF AUTHORITIES

CASES	PAGE:
Alvorod v. Wainwright, 925 F.2d 1282 (11th Cir. 1984).....	43
Barclay v. Florida, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983).....	29,30 32
Caldwell v. Mississippi, 472 U.S. 320 (1985).....	55
California v. Ramos, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983).....	34
Cartwright v. Maynard, 822 F.2d 1477, 1480 (10th cir. 1987); cert. granted sub nom, Maynard v. Cartwright, __U.S.__, 98 L.Ed.2d 645 (1988).....	43
Celestine v. Butler, 823 F.2d 74 (5th Cir. 1987), cert. denied, __U.S.__, 108 S.Ct. 6 (1987)..	43
Davis v. State, 512 So.2d 1291 (Miss. 1987), cert. den. sub nom Mississippi v. Davis, __U.S.__, 56 U.S.L.W. 3591 (1988).....	36
Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).....	36
Edwards v. Thigpen, 433 So.2d 906 (Miss. 1983).....	54
Evans v. State, 485 So.2d 276 (Miss. 1986), cert denied, __U.S.__, 90 L.Ed.2d 994 (1986)	53,55
Evans v. Thigpen, 809 F.2d 239 (5th Cir. 1987), cert. denied, __U.S.__, 107 S.Ct. 3278, 97 L.Ed.2d 783 (1987).....	43

TABLE OF AUTHORITIES CONTD

CASES	PAGE:
Gilliard v. State, 446 So.2d 590 (Miss. 1984).....	49,50
Gregg v. Georgia, 428 U.S. 153, 95 S.Ct. 2909, 49 L.Ed.2d 859 (1976).....	35
Hitchcock v. Duggar, __ U.S.__, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987).....	36
Irving v. State, 498 So.2d 305 (Miss. 1986).....	28,53
Johnson v. Mississippi, ___U.S.___, 98 L.Ed.2d 646 (1988).....	9
Johnson v. Mississippi, ___ U.S. ___, 106 S.Ct. 2930 (1986).....	7
Johnson v. Mississippi, ___ U.S. ___, 106 S.Ct. 1958 (1986).....	7
Johnson v. State, 477 So.2d 196 (Miss. 1985).....	passim
Johnson v. State, 511 So.2d 1333 (Miss. 1987).....	passim
Johnson v. Thigpen, 633 F.Supp. 1121 (S.D.Miss. 1985).....	54
Johnson v. Thigpen, 806 F.2d 1243 (5th Cir. 1986), cert. denied, __U.S.__, 94 L.Ed.2d 802 (1987)	24,54
Knighton v. Maggio, 740 F.2d 1344, 1351-52 (5th Cir. 1984), cert. denied, ___U.S.___, 105 S.Ct. 306, 83 L.Ed.2d 241 (1984).....	28,41
Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).....	36
Lowenfield v. Phelps, 484 U.S. __, 98 L.Ed.2d 568, 108 S.Ct. (1988).....	passim

TABLE OF AUTHORITIES CONTD

CASES	PAGE:
Neuschafer v. Whitley, 816 F.2d 1390 (9th Cir. 1987).....	43
Nixon v. State, __ So.2d__, No. DP-65 (Miss. 1987).....	51,52 53
People v. Johnson, 126 A.D.2d 1008, 509 N.Y.S.2d 789 (4th Dep't 1986)	8
People v. Johnson, 69 N.Y. 339, 506 N.E.2d 1117, 514 N.Y.S.2d 324 (1987).....	8
Phillips v. State, 421 So.2d 476 (Miss. 1982).....	passim
Rault v. Butler, 826 F.2d 299 (5th Cir. 1987), cert. denied, __U.S.__, 108 S.Ct. 14 (1987)...	43
Stringer v. State, 500 So.2d 928 (Miss. 1986).....	28,53
Wainwright v. Goode, 464 U.S. 78, 104 S.Ct. 378, 78 L.Ed.2d 187 (1983).....	30,32
Watson v. Blackburn, 756 F.2d 1055, 1058 (5th Cir. 1985), cert. denied, __U.S.__, 106 S.Ct. 2259, 93 L.Ed.2d 703 (1986)....	43
Wheat v. Thigpen, 793 F.2d 621 (5th Cir. 1986).....	54
Williams v. Maggio, 679 F.2d 381 (5th Cir. 1982) (en banc), aff'd 464 U.S. 46, 104 S.Ct. 311, 78 L.Ed.2d 43 (1983).....	39,40
Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 27733, 77 L.Ed.2d 235 (1983).....	passim

OTHER AUTHORITIES

Miss. Code Ann. §97-3-19.....	6,20
Miss. Code Ann. §99-19-101.....	6,16
Miss. Code Ann. §99-19-105.....	17,27
Miss. Code Ann. §99-39-1.....	
Miss. Code Ann. §99-39-21.....	49

NO. 87-5468

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

SAMUEL BICE JOHNSON,
Petitioner

vs.

STATE OF MISSISSIPPI,
Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

This matter is before the Court on the Petition of Samuel Bice Johnson for a Writ of Certiorari to the Supreme Court of the State of Mississippi wherein the Court denied petitioner post-conviction relief from his sentence of death.

OPINIONS BELOW

The opinion of the Mississippi Supreme Court is reported as Johnson v. State, 511 So.2d 1333 (Miss. 1987). A copy of the

opinion is set out as an exhibit to the Petition for Writ of Certiorari in this case.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under the authority of 28 U.S.C. §1257(3) challenging the constitutionality of his sentence of death.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner has adequately identified the pertinent constitutional and statutory provisions involved and set them forth in an appendix to his brief.

STATEMENT OF THE CASE

A. Substantive Facts:

On December 31, 1981, petitioner Samuel Johnson, Charles Montgomery, Otis Lee Fairley and Anthony Fields left New Orleans, Louisiana, headed for Collins, Mississippi. They were traveling in Johnson's yellow Ford

LTD automobile. They stopped briefly to visit some of Fairley's relatives in Purvis, Mississippi. When they were approaching Collins they were stopped by Mississippi Highway Patrolman Billy Langham for speeding. Langham asked Johnson to produce a driver's license. Johnson had none. Langham then asked Johnson to get out of the car. Johnson complied. When Johnson got out of the car Langham saw a butcher knife on the front seat next to the spot where ohnson had been sitting. He asked Johnson to move to the rear of the car. Langham then placed the butcher knife on top of his patrol car. He went back to the LTD and told the rest of the occupants of the car he was going to search them. He did so one-by-one, sending them to stand near the patrol car as he finished searching each one. He then proceeded to search the LTD.

While he was searching the car Fairley walked to the patrol car, got the butcher knife and gave it to Johnson. Johnson slowly walked back to his car and stabbed Langham in the back as he was searching the back seat of the LTD.

Langham went for his gun. Johnson also went for Langham's gun. They struggled, and Johnson called to Fairley for assistance when Langham proved to be to much for him to handle alone. Johnson and Fairley then struggled with Langham. Johnson yelled to Montgomery and told him to get Langham's gun. When Montgomery secured the gun he yelled to the others that he had the gun. Johnson and Fairley broke free of Langham and went for the car. Montgomery held the gun on Langham. Montgomery started to get in the car and Johnson said "No,

shoot the motherfucker." Montgomery hesitated and Johnson told him again to shoot the officer. Montgomery shot and killed Langham. He then got in the car and threw the gun out as they sped away. During the time this assault on the officer was taking place cars were passing and observing the fight. Some even stopped to render assistance.

The four men abandoned the yellow LTD a short time later and stole a yellow Mercury Comet to cover their escape. They were finally stopped by law enforcement officers shooting out the tires of the car when they attempted to run through a police roadblock.

B. Procedural History

Petitioner appears before this Court as a result of the denial of post-conviction relief by the Mississippi Supreme Court. The conviction and resulting death sentence he is challenging were returned in the

Circuit Court of Pike County, Mississippi. The Pike County trial was conducted pursuant to an indictment returned by the grand jury of Covington County, Mississippi for the capital murder of Highway Patrolman Billy Langham in the course of his duty as a peace officer. Miss. Code Ann. § 97-3-19 (2) (a). Venue was changed to Pike County, Mississippi, on motion of petitioner. Petitioner's bifurcated trial was conducted pursuant to Miss. Code Ann. § 99-19-101 et seq. At the conclusion of the sentencing phase of the trial the jury returned a sentencing verdict of death, finding three aggravating circumstances and holding that they outweighed any mitigating circumstances. These aggravating circumstances were:

> (1) That the defendant, Samuel Johnson, was previously convicted of a felony involving the use of threat of violence to the person.

> (2) That the defendant, Samuel Johnson, committed the capital murder for the purpose of avoiding arrest or effecting an escape from custody.
>
> (3) The capital murder was especially heinous, atrocious and cruel.
>
> Tr. 2294; 511 So.2d at 1337.

On automatic direct appeal to the court below petitioner raised twenty-two separate claims of error. After briefing and argument, on May 8, 1985 the Mississippi Supreme Court affirmed, by written opinion, petitioner's conviction and death sentence. A petition for rehearing was denied on November 6, 1985. Johnson v. State, 477 So.2d 196 (Miss. 1985). Petitioner then filed a petition for writ of certiorari with this Court. After consideration this petition was denied. Johnson v. Mississippi, ____ U.S. ____, 106 S.Ct. 1958 (1986). A petition for rehearing was filed and denied in due course. Johnson v.

Mississippi, ____ U.S. ____, 106 S.Ct. 2930 (1986).

Upon the denial of certiorari from direct appeal petitioner then filed a petition to vacate his conviction and sentence under the state post-conviction collateral relief act. Section 99-39-1, et seq., Miss. Code Ann. (Supp. 1984). During the pendency of this petition, petitioner applied to the courts of the State of New York to vacate his 1963 conviction for assault with intent to rape in that state. The trial court denied relief as did the intermediate court of appeals. See: People v. Johnson, 126 A.D.2d 1008, 509 N.Y.S.2d 789 (4th Dep't 1986). However the New York Court of Appeals reversed the lower courts and granted petitioner relief. People v. Johnson, 69 N.Y. 339, 506 N.E.2d 1117, 514 N.Y.S.2d 324 (1987).

Petitioner then made this fact known to the Mississippi Supreme Court. In due course the court below rendered its decision which is reported as Johnson v. State, 511 So.2d 1333 (Miss. 1987). Petitioner then filed a petition for writ of certiorari with this Court which was granted limited to questions 1 and 2. Johnson v. Mississippi, __U.S.___, 98 L.Ed.2d 646 (1988).

SUMMARY OF THE ARGUMENT

The Mississippi Supreme Court recognized that the New York Court of Appeals had vacated petitioner's 1963 conviction for assault with intent to rape. The fact that the Mississippi Supreme Court did not vacate the death sentence imposed by a jury in Mississippi based on this vacature did not indicate that the Court was not affording the actions of the New York court full faith and credit as required by the Constitution.

It simply means that the vacation of this conviction was not sufficient under Mississippi law to vitiate the death sentence.

The clear precedent from this Court and the state court is that the invalidity of one of several aggravating circumstances found to support a death sentence does not invalidate a death sentence. Where the jury found that three aggravating circumstances existed beyond a reasonable doubt, only one has failed. The Court below, as required by statute, made a proportionality review of the sentence with those entered in like cases considering both the defendant and the crime. In making this review the Court did not rely upon the now vacated New York conviction. There is no indication that the sentence entered in this case was arbitrary or freakish as forbidden by the Eighth Amendment.

The procedural bar imposed by the Mississippi Supreme Court was valid and announced at the time of petitioner's direct appeal. This bar is based on the failure of petitioner to timely attack his New York conviction after the imposition of the death sentence in Mississippi. At trial and on direct appeal he raised no claim of its invalidity although the legal foundation of such a claim existed at the time. His inaction and delay of four years in attacking his New York conviction is an adequate and independent state law ground for imposing a procedural bar to his untimely raising of the issue.

ARGUMENT

1. Mississippi Supreme Court afforded the judgment of the New York Court of Appeals vacating petitioner's 1963 conviction full faith and credit.

Article IV, Section I of the Constitution reads:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general laws prescribe the manner in which such Acts, Records and Proceedings shall be proved, and the effect thereof.

Petitioner claims that the Mississippi Supreme Court violated the "full faith and credit" clause of this constitutional provision when it refused to vacate the 1982 Mississippi death sentence which relied in part on a 1963 assault with intent to rape conviction from New York when the New York Court of Appeals, in 1987, vacated that conviction. However, the question here is not whether the Mississippi Supreme Court recognized the judgment of the State of New York as it clearly did. The question we must address is whether the action taken in response to this vacature of petitioner's 1963 conviction was sufficient under the "full faith and credit" clause. Respondent

would contend that, under the facts and circumstances of this case, it was.

The Mississippi Supreme Court in deciding this post-conviction motion recognized that the New York Court of Appeals had vacated the 1963 conviction for assault with intent to rape. The court stated:

> In this petition, for the first time, Johnson argues that the 1963 conviction was invalid. Apparently, following or commensurate with its filing, Johnson's counsel also took steps to have this conviction vacated by the New York courts. This Court has been furnished with a copy of an order and slip opinion of the Court of Appeals of New york, dated March 24, 1987, in which that court did indeed reverse and vacate this 1963 conviction and dismiss the indictment.
>
> The New York courts are, of course, the final and proper arbiters of all judicial proceedings in that state, including the disposition of post-conviction petitions. Assuredly, by our view, we suggest no impropriety in the courts of that state taking whatever action they deem appropriate in a criminal case in New York.

511 So.2d at 1339.

The clear indication is that Mississippi Supreme Court recognized the fact that New York had vacated the 1963 conviction.

In considering whether or not the vacation of the New York conviction warranted vacation of the death sentence in Mississippi the Mississippi Supreme stated:

> As we noted, the jury found three aggravating circumstances existed, and of the three we have little doubt that in a rational sentencing process Zant v. Stephens, supra, the other two aggravating circumstances would carry greater weight than the New York conviction in determining Johnson's sentence. Indeed, the remoteness in time of the prior conviction was a mitigating circumstance. Johnson v. State, 477 So.2d at 219.
>
> We eschew "harmless error" in our reasoning, however, because the district attorney argued this particular aggravating circumstance as a reason to impose the death penalty. Johnson v. State, 477 So.2d at 219. Nevertheless we reject New York's setting aside of the 1963 conviction as a basis to vacate the verdict of the jury.

Respondent would submit that petitioner and amici are wrong when they contend that

giving "full faith and credit" to the vacature of the New York conviction is synonymous with vacating the death sentence in Mississippi. Petitioner relies on the cases involving the reduction of enhanced sentences when the conviction used to enhance the sentence is vacated by another state. While it is true that in most states, as in Mississippi [(See Phillips v. State, 421 So.2d 476 (Miss. 1982)], the vacation of a conviction used to enhance a sentence pursuant to an habitual offender statute, requires a resentencing without the vacated sentence. That is not the case here. As the court pointed out in the case at bar, proof of the required prior convictions under Mississippi's habitual sentencing scheme automatically results in the maximum authorized sentence. The capital sentencing scheme does not operate in that manner. Where the habitual

sentencing hearing is held before a trial judge alone, capital sentencing is required to be held before for a jury. Miss. Code Ann. §99-19-101(1), (Supp. 1977). In an habitual sentencing proceeding there is only one thing that can enhance the sentence, that is the existence of certain prior convictions. In a Mississippi capital proceeding, one has first to be indicted for one of seven narrowly defined capital offenses and found guilty of that offense. The jury is then required to find beyond a reasonable doubt the existence of at least one of the eight statutory aggravating circumstances. The jury must determine whether the aggravating circumstances outweigh the mitigating circumstances and then determine if the sentence of death is appropriate. There is no requirement that the jury return a sentence of death. After a sentence of death is returned there is an

automatic appeal where the supreme court is required to determine whether the sentence is arbitrary or disproportionate. Miss. Code Ann. §99-19-105(3). It is evident that the use of a prior conviction in the capital sentencing scheme is only remotely similar to it use in the habitual offender enhanced punishment scheme. The Mississippi Supreme Court decided that it was not necessary to vacate the death sentence because of the actions of the New York court.

We submit that the actions of the Mississippi court were sufficient to pass muster under the "full faith and credit" clause. However, even if it were found that the Mississippi Supreme Court did not extend full faith and credit to the actions of the New York court it matters not. Even if the court below had held that it would not recognize the New York vacature, which it

did not, the outcome below would have been the same. The Mississippi court held that the vacation of the sentence was not sufficient to change the outcome of the sentencing proceeding in Mississippi.

We would state that this is not a refusal to grant full faith and credit to the New York judgment, but is only a state law interpretation of the effect of such a vacature on a death sentence in Mississippi.

> 2. Where one of three aggravating circumstance relied on at sentencing was subsequently invalidated, there is no requirement that petitioner be resentenced.

Respondent would submit that there is no requirement that the subsequent invalidation of one of three aggravating circumstances found by a jury to support a death sentence mandates the vacation of that death sentence. There are several reasons that this is not so under the particular circumstances of this case.

First, under this Court's holding in Lowenfield v. Phelps, 484 U.S. ____, 98 L.Ed.2d 568, 108 S.Ct. ____ (1988), the function of aggravating circumstances is different under different statutory schemes. The Court stated:

> It seems clear to us from this discussion that the narrowing function required for a regime of capital punishment may be provided in either of these two ways: The legislature may itself narrow the definition of capital offense, as Texas and Louisiana have done, so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase. See also Zant, supra, at 876, n. 13, 77 L.Ed.2d 235, 103 S.Ct. 2733, discussing Jurek and concluding, "in Texas, aggravating and mitigating circumstances were not considered at the same stage of the criminal prosecution."

Here, the "narrowing function" was performed by the jury at the guilt phase when it found defendant guilty of three counts of murder under the provision that "the offender has a specific intent to

kill or to inflict great bodily harm upon more than one person." The fact that the sentencing jury is also required to find the existence of an aggravating circumstance in addition is no part of the constitutionally required narrowing process, and so the fact that aggravating circumstance duplicated one of the elements of the crime does not make the sentence constitutionally infirm. There is no question but that the Louisiana scheme narrows the class of death-eligible murderers and then at the sentencing phase allows for the consideration of mitigating circumstances and the exercise of discretion. The Constitution requires no more.

98 L.Ed.2d at 582-83.

For the purposes of this analysis, the Mississippi capital punishment scheme is no different than that in Louisiana. Section 97-3-19, Miss. Code Ann. (Supp. 1983), defines murder and capital murder.[1] In Mississippi the definition of capital murder serves the same purpose as it does in Texas

[1] Murder and capital murder are defined in section 97-3-19 (Supp. 1983) as:

and Louisiana. As can be seen from a reading of this statute, capital murder is limited to seven types of murders. Therefore under the rationale of Lowenfield, the aggravating circumstance that the jury

> (1) The killing of a human being without the authority of law by any means or in any manner shall be murder in the following cases:
>
> (a) When done with deliberate design to effect the death of the person killed, or of any human being;
>
> (b) When done in the commission of an act eminently dangerous to others and evincing a depraved heart, regardless of human life, although with any premeditated design to effect the death of any particular individual; (c) When done without any design to effect death by any person engaged in the commission of any felony other than rape, kidnapping, burglary, arson, robbery, sexual battery, unnatural intercourse with mankind, or felonious abuse and/or battery of a child in violation of subsection (2) of section 97-5-39, or in any attempt to commit such felonies.

is required to find, under state law, during the sentencing phase of a capital trial has

---

> (2) The killing of a human being without the authority of law by any means or in any manner shall be capital murder in the following cases:
>
> (a) Murder which is perpetrated by killing a peace officer or fireman while such officer or fireman is acting in his official capacity or by reason of an act performed in his official capacity, and with knowledge that the victim was a peace officer or fireman. . . . (Definition of peace officer omitted);
>
> (b) Murder which is perpetrated by a person who is under sentence of life imprisonment;
>
> (c) Murder which is perpetrated by use or detonation of a bomb or explosive device;
>
> (d) Murder which is perpetrated by any person who has been offered or has received anything of value for committing the murder, and all parties to such a murder, are guilty as principals;

no constitutional significance in the constitutionally required narrowing

---

> (e) When done with or without any design to effect death, by any person engaged in the commission of the crime of rape, burglary, kidnapping, arson, robbery, sexual battery, unnatural intercourse with any child under the age of twelve (12), or nonconsensual unnatural intercourse with mankind, or in any attempt to commit such felonies;
>
> (f) When done with or without any design to effect death, by any person engaged in the commission of the crime of felonious abuse and/or battery of a child in violation of subsection (2) of section 97-5-39, or in any attempt to commit any such felony;
>
> (g) Murder which is perpetuated by the killing of any elected official of a county, municipal, state or federal government with knowledge that the victim was such public official.

Subsection (f) and the two unnatural intercourse parts of subsection (e) were not part of the statute at the time petitioner committed his crime.

process. As does Louisiana's scheme, the Mississippi scheme "narrows the class of death-eligible murderers and then at the sentencing phase allows for the consideration of mitigating circumstances and the exercise of discretion." 98 L.Ed.2d at 582.

The Fifth Circuit Court of Appeals, in Johnson v. Thigpen, 806 F.2d 1243 (5th Cir. 1986), spoke to the constitutional significance of aggravating circumstances in Mississippi. The Fifth Circuit stated:

> The definition of capital murder in Mississippi serves the same narrowing function as the parallel aggravating circumstance would in Georgia.
>
> In fact, the Mississippi death penalty statute, as applied in this case, is indistinguishable from the Texas statute. In approving the Texas statute in Jurek, the Supreme Court recognized that, by defining capital murder narrowly, "in essence, the Texas statute requires that the jury find the existence of a

statutory aggravating circumstance before the death penalty may be imposed." 428 U.S. at 270, 96 S.Ct. at 2955. As this court stated in Welcome v. Blackburn, 793 F.2d 672, 677 (5th Cir. 1986)

> By classifying first degree murder as including certain aggravating circumstances the state has narrowed the class of those subject to the death penalty as effectively as if it allowed a broader class to be convicted but then limited those within the broader class who could be sentenced to death to only persons whose crimes are accompanied by specific aggravating circumstances.
>
> The Mississippi statute, unlike the Texas statute, provides the added protection of requiring proportionality review by the state supreme court. Compare Miss. Code Ann. § 99-19-105(3)(c) (Supp. 1985) with Pulley v. Harris, 465 U.S. 37, 104 S.Ct. 871, 878, 79 L.Ed.2d29 (1984). See Barclay v. Florida, 463 U.S. 939, 958, 103 S.Ct. 3418, 3429, 77 L.Ed.2d 1134 (1983) (plurality opinion); Stephens, 462 U.S. at 879-80, 103 S.Ct. at 2743. Thus, the Mississippi death penalty statute satisfies constitutional requirement despite the broad construction placed on the especially heinous aggravating

circumstance by the Mississippi Supreme Court.

We do not base this decision on the harmless error doctrine of Stephens, 462 U.S. at 884-91, 103 S.Ct. at 2746-50. See Barclay, 463 U.S. at 951 n.8, 103 S.Ct. at 3425 n. 8. Mississippi's choice to apply a broadened construction to the especially heinous aggravating circumstance is not constitutional error. If the change in construction is an error at all, it is an error of state law that is not cognizable on habeas review. Harris, 104 S.Ct. at 875; Barclay, 463 U.S. at 957-58, 103 S.Ct. at 3428-29. [Footnotes omitted.]

806 F.2d at 1248-49.

Seemingly, the only conclusion that can be reached after a reading of the opinions in Lowenfield and Johnson, is that under the Mississippi scheme, aggravating circumstances are not required by the Federal Constitution. They are only a further, state law imposed, hurdle that must be crossed in the process to select those eligible to receive the death penalty. If

they are not required under the federal constitution then the interpretation and application of these circumstances, are for the most part, a matter of state law. Here, the Mississippi Supreme Court considered the effect of the vacation of the New York conviction on the death sentence given in Mississippi and found this not to require vacation of the death sentence. Hence, under Mississippi's double narrowing scheme the statutory aggravating circumstances do not take on a federal constitutional significance.

As required by the Section 99-19-105, Miss. Code Ann. (Supp. 1985) the Mississippi Supreme Court reviewed the sentence of death on automatic appeal when it was imposed. Under the dictate of Section 99-19-105(3), the court must determine:

> (a) Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor;

(b) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in Section 99-19-101; and

(c) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

This type appellate review was underscored in Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 27733, 77 L.Ed.2d 235 (1983). See: Knighton v. Maggio, 740 F.2d 1344, 1351-52 (5th Cir. 1984), cert. denied, ____U.S.____, 105 S.Ct. 306, 83 L.Ed.2d 241 (1984) In Zant the Court stated:

> Our decision in this case depends in part on the existence of an important procedural safeguard, the mandatory appellate review of each death sentence by the Georgia Supreme Court to avoid arbitrariness and to assure proportionality. We accept the court's view that the subsequent invalidation of one of several statutory aggravating circumstances does not automatically require reversal of the death penalty, having been assured that a death sentence will be set aside if the invalidation of an aggravating circumstance makes the penalty arbitrary or capricious. 250 G., at 101, 297 SE2d, at 4. The Georgia Supreme Court, in its response to our certified question, expressly stated: "A different result might be reached in a case where evidence was submitted in support of a statutory aggravating circumstance which was not otherwise admissible, and thereafter the circumstance failed." Ibid. As we noted in Gregg, 428 U.S. at 204-205, 49 L.Ed.2d 859, 96 S.Ct. 2909, we have also been assured that a death sentence will be vacated if it is excessive or substantially disproportionate to the penalties that have been imposed under similar circumstances.
>
> [Emphasis added.] 77 L.Ed.2d at 258.

The importance of the appellate review to a capital punishment scheme was again discussed in Barclay v. Florida, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983), this time in the context of a balancing scheme. The Court held:

> In this case, as in Zant, supra, at 890, 77 L.Ed.2d 235, 103 S.Ct. 2733, our decision is buttressed by the Florida Supreme Court's practice of reviewing each death sentence to compare it with other Florida capital cases and to determine whether "the punishment is too great."
>
> 77 L.Ed.2d at 1149.

While the Court noted that no mitigating circumstances existed in Barclay, such fact clearly was not necessary to the decision. This was demonstrated later in Wainwright v. Goode, 464 U.S. 78, 104 S.Ct. 378, 78 L.Ed.2d 187 (1983), where the Court again considered the effect of an improper aggravating circumstance in the balancing process, this time where mitigating circumstances were present. In Goode the Court held:

> The critical question "is whether the trial judge's consideration of this improper aggravating circumstance so infects the balancing process created by the Florida statute that it is constitutionally impermissible for the Florida Supreme Court to let the sentence stand." Id., at 956, 77 L.Ed.2d 1134, 103 S.Ct. 3418.
>
> We have great difficulty concluding that the balancing process was so infected. A properly instructed jury recommended a death sentence. On direct appeal to the Florida Supreme Court, the court stated that "[c]omparing the aggravating circumstances with those shown in other capital cases and weighing the evidence in the case sub judice, our judgment is that death is the proper sentence." Goode v. State, 365 So.2d at 384-385. Whatever may have been true of the sentencing judge, there is no claim that in conducting its independent reweighing of the aggravating and mitigating circumstances the Florida Supreme Court considered Goode's future dangerousness. Consequently, there is no sound basis for concluding that the procedures followed by the State produced an arbitrary or freakish sentence forbidden by the Eighth Amendment.
>
> [Emphasis added.] 78 L.Ed.2d at 193-194.

As stated above the court below, by state statute and its own opinion, is required to review the sentence for arbitrariness and to assure proportionality. This required review was made in this case on direct appeal. The court held:

> Under the facts of this case, the jury was warranted in believing Johnson an active participant, if indeed not the leader, in a deliberate, brutal slaying of a peace officer carrying out his duties. In the absence of the abolition of the death penalty, no appellate court is justified in holding that the jury having found Johnson guilty, could

not also return a death penalty verdict under these facts.

The very word "murder" embraces within its meaning cruelty, brutality and an evil intent carried to the ultimate in harm: death. It is redundant to characterize a murder as cruel, brutal or malicious.

Civilized society must place its dependence on peace officers. They preserve the peace, protect us from harm and pursue the wrongdoer. They are the front line infantry in society's eternal struggle with crime.

The murder of a police officer in the line of duty must be equated with treason or espionage in time of war. Such a crime warrants the most severe punishment society exacts.[3]

---

[3] It follows this case is not disproportionate to the sentence imposed in other capital murder cases.

477 So.2d at 217.

This finding by the Mississippi Supreme Court that the sentence was not arbitrary or disproportionate to that imposed in other cases would satisfy Goode, Barclay, and Zant, even if the Mississippi statute were

like the Georgia or Florida statutes in its application. However, as we have pointed out, the Mississippi statute is like the Louisiana statute in its application, where aggravating circumstances do not play a constitutionally required narrowing role in Mississippi.

It is clear from reading the excerpt from the opinion on direct appeal quoted above that the court below, when reviewing whether or not the sentence was disproportionate, did not consider the prior New York conviction in its review. 477 So.2d at 217. While the court below did find that the prior conviction aggravating circumstance was supported by the record (477 So.2d 219), there is no mention of the prior conviction in considering whether or not the sentence was disproportionate to the crime or other sentences. It cannot be said, in light of the findings on appeal by the Mississippi Supreme Court, that the

jury's consideration of this later vacated conviction forms a sound basis for concluding that the sentence is arbitrary or freakish. 78 L.Ed.2d at 194.

Clearly the evidence of the New York conviction was admissible at the time of the trial in this case. At the time of his trial the prior conviction was undisturbed, and as stated in Zant there is "[n]othing in the United States Constitution that prohibits a trial judge from instructing a jury that it would be appropriate to take account of a defendant's prior criminal record in making its sentencing determination . . ." 77 L.Ed.2d at 257. On direct appeal the Mississippi Supreme Court found that consideration of a prior felony conviction, as an aggravating circumstance, was not prohibited by the Federal Constitution, citing Zant, California v. Ramos, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171

(1983); and Gregg v. Georgia, 428 U.S. 153, 95 S.Ct. 2909, 49 L.Ed.2d 859 (1976). 477 So.2d at 218. Further the court below found that the remoteness in time of the conviction did not invalidate its consideration. However, petitioner obtained an instruction on and was allowed to argue to the jury as a mitigating factor the remoteness in time of the conviction. 477 So.2d at 219. It is clear that at the time of his Mississippi conviction and sentence of death petitioner did not consider the New York conviction invalid. The court also found the other aggravating circumstances returned by the jury were proper and as later stated in the post-conviction review opinion, "would carry greater weight than the New York conviction in determining Johnson's sentence." 511 So.2d at 1338.

It is also significant to point out that under the rulings of the Mississippi

Supreme Court there is no limitation on the consideration of mitigating circumstances. See: Davis v. State, 512 So.2d 1291 (Miss. 1987), cert. den. sub nom, Mississippi v. Davis, ___ U.S.___, 56 U.S.L.W. 3591 (1988) (Held reversible error to deny defense attempt to introduce as mitigating circumstance that Davis had a prior conviction for assault that resulted in prison sentence). This is in total compliance with the rulings found in Hitchcock v. Duggar, __ U.S.__, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987); Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). In this case the jury was instructed that they could consider as mitigating:

1) Any circumstance or combination of circumstances surrounding the defendant's life and character which reasonably mitigates against the imposition of the death penalty.

2) Samuel Johnson's ability to adjust well to prison life without violence.

3) The defendant did not fire the gun.

4) Samuel Johnson has shown no incidents of violence in past stays in prison.

5) Samuel Johnson's only previous conviction of a felony involving the use or threat of violence to the person of another was over 19 years ago on April 9, 1963.

6) Any and all other matters, facts, and circumstances which you as jurors may consider from the evidence as mitigating.

Tr. 260

From this list there can be no contention that the consideration of mitigating evidence was in any way limited. This is in line with the concern with mitigating circumstances in Lowenfield, when considering statutes where the finding of aggravating circumstances are not constitutionally required. 98 L.Ed.2d at 583.

Here the Mississippi Supreme Court, in its post-conviction opinion, recognized the vacation of the 1963 New York conviction and then considered the effect of this vacature on the death sentence imposed in Mississippi. Although the Mississippi Supreme questioned the reasoning behind and the actual procedures used in vacating the New York conviction, this is not pertinent to this inquiry. The court held that under state law this vacature did not require the setting aside of the verdict of death. The quibbling by amicus whether this vacature was achieved by direct appeal or a post-conviction collateral proceedings does not change the effect of the ruling. This process was begun by the filing of a post-conviction motion to obtain an out of time appeal and is not the type of direct appeal contemplated by the Mississippi Supreme Court in its opinion.

In Williams v. Maggio, 679 F.2d 381 (5th Cir. 1982) (en banc), aff'd 464 U.S. 46, 104 S.Ct. 311, 78 L.Ed.2d 43 (1983), the Fifth Circuit considered whether the Louisiana Supreme Court's failure to consider the validity of all the aggravating circumstances found violated the constitution. The court held:

> The aggravating circumstance of armed robbery-murder was present and unanimously found by the jury. Under Louisiana law this means that the two questioned aggravating circumstances are not necessary to entitle the jury to consider imposition of the death penalty. The extra findings went to the gravity of his crime, not the jury's power to impose the death penalty.
>
> Since the requisite one aggravating circumstance of murder in the course of an armed robbery is clearly present and was unanimously found by the jury, the other two circumstances are only material to deciding whether the aggravating and mitigating circumstances weighted together indicate the death penalty should be imposed. Here, the thing of significance is how the jurors perceived the weight of these actions by petitioner. The weight they

> assigned in determining whether the petitioner's acts were or were not outweighed by mitigating circumstances [sic] necessarily be ested [sic] by how they viewed the fact they properly knew. The jury necessarily focused on what Williams had done, not on how Louisiana classified his actions, since they were not instructed on the legal meaning of the terms involved.
>
> . . .
>
> This speculation is beside the mark, however, because the meaningful portions of this verdict, (1) that at least one aggravating circumstance was present and (2) that under the totality of aggravating and mitigating circumstances the death penalty should be imposed, were the product of channeled discretion and are rationally reviewable.
>
> . . .
>
> Irregardless [sic] of the number of aggravating circumstances returned by the jury, the implication is clear that, in the absence of facial unconstitutionality, one may properly serve as the basis for appellate affirmation of the death sentence.
>
> 679 F.2d at 389-90.

As pointed out in Williams, the speculation as to what effect the validity or invalidity of an aggravating circumstance has on the

weighing process misses the mark. The thing that must be viewed is whether or not at least one of the aggravating circumstances was found beyond a reasonable doubt and whether the finding, under the totality of the aggravating and mitigating circumstances that the death penalty should be imposed, was the product of channeled discretion and is rationally reviewable. We would submit that the decision to impose death in this case was the product of channeled discretion and that decision was and is rationally reviewable even after the vacation of the 1963 New York conviction. In Knighton v. Maggio, the Fifth Circuit upheld a death sentence where the Louisiana Supreme Court refused to review the question of whether an aggravating circumstance was supported by any evidence. The Louisiana Supreme Court held '"[i]f the jury finds more than one statutory aggravating circumstance and one

is clearly supported by the record, the sentence need not be overturned because one of the additional aggravating circumstances is not supported." 740 F.2d at 1344. See: Stringer v. State, 500 So.2d 928 (Miss. 1986); Irving v. State, 498 So.2d 305 (Miss. 1986) The Fifth Circuit, denying habeas relief held:

> Knighton argues that this position of the Louisiana Supreme Court is contrary to the eighth amendment, as elucidated in Furman v. Georgia and Gregg v. Georgia. We do no agree. In Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 2746, 77 L.Ed.2d 235, 254 (1983), the Supreme Court observed that "a death sentence supported by at least one valid aggravating circumstance need not be set aside . . . simply because another aggravating circumstance is 'invalid' in the sense that it is insufficient by itself to support the death penalty." The Supreme Court of Louisiana, like its Georgia counterpart, examines the death penalty to assure that it is not excessive, La.C.Cr.P. art. 905.9. This review was deemed important and underscored in Zant v. Stephens.
>
> The Louisiana Supreme Court made its capital sentence review as prescribed, 436 So.2d at 1157-61, and upheld the conviction and sentence. We perceive no constitutional inadequacy in the application of Louisiana law in this instance. There is nothing in this record to support the charge that the jury acted arbitrarily or capriciously or without adequate guidance in its imposition of the death penalty.
>
> 740 F.2d at 1351-1352.

See: Rault v. Butler, 826 F.2d 299 (5th Cir. 1987), cert. denied, ___U.S.___, 108 S.Ct. 14 (1987): Celestine v. Butler, 823 F.2d 74 (5th Cir. 1987), cert. denied, ___U.S.___, 108 S.Ct. 6 (1987); Neuschafer v. Whitley, 816 F.2d 1390 (9th Cir. 1987); Evans v. Thigpen, 809 F.2d 239 (5th Cir. 1987), cert. denied, ___U.S.___, 107 S.Ct. 3278, 97 L.Ed.2d 783 (1987); Watson v. Blackburn, 756 F.2d 1055, 1058 (5th Cir. 1985), cert. denied, ___U.S.___, 106 S.Ct. 2259, 93 L.Ed.2d 703 (1986); Alvorod v. Wainwright, 925 F.2d 1282 (11th Cir. 1984); Accord, Cartwright v. Maynard, 822 F.2d 1477, 1480 (10th cir. 1987); cert. granted

sub nom, Maynard v. Cartwright, ___U.S.___, 98 L.Ed.2d 645 (1988).

In light of Lowenfield, the only thing constitutionally required for the jury to impose the death penalty in Mississippi, as in Louisiana, is that a verdict of guilty of capital murder be returned and then the jury be allowed to consider mitigating circumstances. That occurred here when petitioner was convicted of the narrowly defined offense of murder of a peace officer. The jury was fully instructed as to the mitigating circumstances they could consider. The requirement of finding additional aggravating circumstances is purely a matter of state law. The fact that the jury found a state law aggravating circumstance that was later held to be invalid does not involve a federal right even when the jury was required to weigh the aggravating against the mitigating circum-

stances and determine that the aggravating outweighed the mitigating circumstances in this case. The Supreme Court of Mississippi in making its initial proportionality review did not consider the prior conviction in determining whether the sentence of death was proper in this case. Under Goode this is sufficient to overcome the jury's consideration of the later vacated conviction.

3. The Procedural Bar

We come finally to the issue of the procedural bar imposed by the Mississippi Supreme Court regarding raising the 1963 New York conviction. Much ado has been made about Respondent's reliance on Phillips v. State, 421 So.2d 476 (Miss. 1982), in the case at bar. Contrary to the position taken in the amicus brief of the Mississippi Public Defenders' Association, the Respondent did not make an argument based on Phillips at any time in this case.

This issue of the 1963 conviction was raised as a direct error in the original post-conviction pleading and as a question of whether or not petitioner was denied effective assistance of counsel. The direct claim was that the New York conviction must be presumed invalid. Petitioner further alleged that his trial and appellate counsel were ineffective for not having investigated into the facts surrounding the 1963 New York conviction and for not challenging this conviction prior to trial or on appeal. The response of the state was simply that the issue was procedurally barred for failure to raise the claim couched in those terms at trial or on direct appeal. There was no citation to Phillips in the State's responsive brief. Response to Petitioner's Application for Leave to File Motion for Post-Conviction Relief at 7. In the context

of the ineffective assistance of counsel claim the response was as follows:

> Finally petitioner raises the question of his 1963 conviction in New York for assault with intent to rape. As of this date the conviction still stands. A petition for writ of error coram nobis has been filed with the courts of New York attacking this conviction on the basis of the failure to grant an appeal and failure to give a proper hearing on the voluntariness of the confession petitioner gave at the time. Because the record of the trial has been destroyed or lost relief will probably be granted. This would do no harm to the conviction here as there are two other valid aggravating circumstances existing in this case that the jury found.

However the question is the failure to investigate concerning this earlier conviction. The truth of the matter is that such a conviction is presumed to be correct just as counsel stated in his affidavit. Although the crime was assault with intent to rape. At the sentencing hearing the trial judge stated:

> And here he is now, a rapist and that's what he is, attacked an innocent young lady who was on her way to work in the kitchen of one of our local hospitals.

> He is without question lazy, a liar and a rapist.
>
> Exhibit K to Motion, at page 2.
>
> Try as he may he cannot change what he was charged with and convicted. There was a trial with a jury and a conviction. Trial counsel was perfectly within sound trial practice to assume that a conviction that was 20 years old without a challenge was valid. Where is the prejudice as there are two other aggravating circumstances existing in this case.
>
> Respondent's State Post-Conviction Response at 34.

When the response of the state was filed the conviction was only under attack in New York and still presumed valid, however no argument was made on the basis on Phillips by the state. When the New York conviction was vacated, petitioner notified the Mississippi Supreme Court of this action on April 15, 1987. Thereafter on April 28, 1987, petitioner filed a supplemental brief before the court below. The decision in this case was handed down on May 27, 1987, without the state being given an opportunity to respond.

The state's argument for procedural bar, had we been invited to make one, would have been based on the rationale found in Gilliard v. State, 446 So.2d 590 (Miss. 1984) and Miss. Code Ann. §99-39-21 (Supp. 1984). The court below, in Gilliard, held:

> We resolve the question referred to in Minor, supra, and hold that a defendant at a criminal trial who has litigated matters of fact and law at the trial, and whose conviction has been affirmed, may not, through a writ of error coram nobis, present and litigate the question again, even though then framed and placed in a setting of federal constitutional questions.
>
> 446 So.2d at 592.

Section 99-39-21 reads, in part:

> (2) The litigation of a factual issue at trial and on direct appeal of a specific state or federal legal theory or theories shall constitute a waiver of all other state or federal theories which could have been raised under said factual issue; and any relief sought under this chapter upon said facts but upon different state or federal legal theories shall be

procedurally barred absent a showing of cause and actual prejudice.

. . .

(4) The term "cause" as used in this section shall be defined and limited to those cases where the legal foundation upon which the claim of relief is based could not have been discovered with reasonable diligence at the time of trial or direct appeal.

(5) The term "actual prejudice" as used in this section shall be defined and limited to those errors which would have actually adversely affected the ultimate outcome of the conviction or sentence.

Gilliard and the statute simply hold that one cannot raise a claim and litigate it unsuccessfully on one legal theory at trial or on direct appeal and then on post-conviction review change the legal theory or basis for challenge.

Under Mississippi law petitioner could not meet the "cause" prong to overcome the procedural bar because he cannot demonstrate that the "legal foundation upon which the

claim for relief is based could not have been discovered with reasonable diligence at the time of trial or direct appeal."

The Court below did not use Phillips as a procedural bar case. The discussion of Phillips was under the section of the opinion dealing with how a vacated sentence used as an aggravating circumstance would be treated on post-conviction review. This is not contrary to the direct appeal decision in Nixon v. State, ___ So.2d___, No. DP-65 (Miss. 1987) [See Appendix A to Amicus Brief of the Mississippi Public Defenders Association]. It must be noted that Nixon raised questions as to the facial validity of his prior conviction on direct appeal. This was not done in the case at bar. Here, petitioner's arguments were based on the theory that the prior conviction was not a proper aggravating circumstance because it did not "channel the jury's discretion by

'clear and objective standards,' and because it was too remote." 511 So.2d at 1336, 447 So.2d 218-19. Clearly the problems with the New York conviction existed at the time of the trial and direct appeal of this case. Petitioner did not assert them then and even requested and was given an instruction on the remoteness in time of the conviction being a mitigating factor. 477 So.2d at 219.

The discussion of Phillips by the court below was not in relation to the procedural bar; it related to how the vacation of a conviction, used as an aggravating circumstance in a death penalty case, would be treated and why the treatment was different than that given a prior conviction used to ...ance punishment under the habitual offender provisions of Mississippi law. The decision in Nixon is no different. In

Nixon, the Court rejected the defendant's argument that if the Court found the introduction of his prior rape conviction improper that they must reverse the death sentence. [Miss. Public Defender's Brief at A-5.] The court based its rejection on the prior opinions in Stringer v. State, 500 So.2d 928 (Miss. 1986) and Irving v. State, 498 So.2d 305 (Miss. 1986).

The procedural bar holding by the Mississippi Supreme court in this case is not based on Phillips, but is based on the ruling in Evans v. State, 485 So.2d 276 (Miss. 1986), cert denied, ___U.S.___, 90 L.Ed.2d 994 (1986). There the petitioner did not raise a claim of improper jury selection until more than four years after the conviction was imposed and where at least three different sets of counsel had worked on the case. The court held the claim to be barred. The scenario is

basically the same here. Petitioner did nothing in regard to his New York conviction from the time of his indictment in January, 1982 until August, 1986, when the post-conviction proceeding was filed in New York. During this time petitioner was represented by three different sets of attorneys. It is clear that the procedural bars set forth in Edwards v. Thigpen, 433 So.2d 906 (Miss. 1983) as applied in Johnson v. Thigpen, 633 F.Supp. 1121 (S.D.Miss. 1985) and Johnson v. Thigpen, 806 F.2d 1243 (5th Cir. 1986), cert. denied, __U.S.__, 94 L.Ed.2d 802 (1987), are applicable in this case. Petitioner was convicted in 1982; however, his assignment of errors and brief on direct appeal were not filed until February 14, 1984, long after the March, 1983 of the Edwards opinion. Under the facts of this case, Wheat v. Thigpen, 793

F.2d 621 (5th Cir. 1986), cited by petitioner, is not applicable.

After his conviction, petitioner did not, in any timely fashion, attempt to have the New York conviction overturned. He waited for more than two years before instigating any post-conviction proceedings in New York. Clearly under the rationale of Evans he is barred from raising this claim at this time. We are dealing here with a different procedural bar and it is not inconsistent with the decision in Phillips.

The Mississippi Supreme Court clearly invoked a valid procedural bar to the consideration of this issue and this Court has stated that it will enforce the clear invocation of a state law based procedural bar. Caldwell v. Mississippi, 472 U.S. 320 (1985).

CONCLUSION

For the above and foregoing reasons the decision of the Mississippi Supreme Court denying petitioner's motion for post-conviction relief should be affirmed.

Dated: Jackson, Mississippi
March 26, 1988

Respectfully submitted

Mike Moore
Attorney General
State of Mississippi

Marvin L. White, Jr.
Assistant Attorney General
(Counsel of Record)

Office of the Attorney General
Post Office Box 220
Jackson, Mississippi 39205
Telephone: (601) 359-3680

CERTIFICATE OF SERVICE

I, Marvin L. White, Jr., Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed, via United States Postal Service, first-class postage prepaid, three (3) true and correct copies of the foregoing Brief for Respondents to the following:

Laurence Sorkin, Esquire
Cahill Gordon & Reindel
80 Pine Street
New York, New York 10005

and

Robert M. Kaufman, Esquire
President, The Association of
the Bar of the City of New York
42 West 44th Street
New York, New York 10036-6690

and

Thomas M. Fortner, Esquire
President, Mississippi Public
Defenders' Association
Post Office Box 998
Pascagoula, Mississippi 39567

This the 26th day of March, 1988.

Marvin L. White, Jr.
MARVIN L. WHITE, JR.

Supreme Court, U.S.
FILED
APR 16 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-5468

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SAMUEL BICE JOHNSON,

Petitioner,

—v.—

STATE OF MISSISSIPPI,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

REPLY BRIEF FOR PETITIONER

CLIVE A. STAFFORD SMITH
SOUTHERN PRISONERS' DEFENSE COMMITTEE
185 Walton Street, N.W.
Atlanta, Georgia 30303
(404) 688-1202

FLOYD ABRAMS
LAURENCE T. SORKIN*
MARSHALL COX
ANTHONY PADUANO
CAHILL GORDON & REINDEL
(a partnership including professional corporations)
80 Pine Street
New York, New York 10005
(212) 701-3000

Attorneys for Petitioner Samuel Bice Johnson

* *Counsel of Record*

April 16, 1988

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
I MISSISSIPPI'S CONCESSION THAT IT WAS OBLIGED TO AFFORD FULL FAITH AND CREDIT TO THE NEW YORK COURT'S REVERSAL OF JOHNSON'S NEW YORK CONVICTION REQUIRES REVERSAL OF JOHNSON'S DEATH SENTENCE	1
II RESENTENCING IS NECESSARY WHEN A DEATH SENTENCE DEPENDS UPON AN INVALID PRIOR CONVICTION	4
III THERE IS NO VALID PROCEDURAL BAR TO THIS COURT'S REVIEW	7
CONCLUSION	10

TABLE OF AUTHORITIES

Cases PAGE

Baldwin v. *State*, 499 S.W.2d 7 (Tex. Crim. App. 1973) 5n

Barclay v. *Florida*, 463 U.S. 939 (1983)..... 4, 6

Burgett v. *Texas*, 389 U.S. 109 (1967)..... 5

Burrell v. *McMann*, 51 Misc. 2d 185, 273 N.Y.S.2d 9 (Sup. Ct. Clinton Co. 1966)..... 2n

City of Pendleton v. *Standerfer*, 297 Or. 725, 688 P.2d 68 (1984)..... 5n

Commonwealth v. *Barrett*, 3 Mass. App. 8, 322 N.E.2d 89 (1975)..... 5n

DeBussi v. *State*, 453 So. 2d 1030 (Miss. 1984)..... 9

Evans v. *State*, 485 So. 2d 276 (Miss.), *cert. denied*, 476 U.S. 1178 (1986)..... 8n

Ford v. *State*, 437 So. 2d 13 (Miss. 1983)..... 5n

Haislip v. *Morris*, 84 Wash. 2d 106, 524 P.2d 405 (1974) 5n

Hathorn v. *Lovorn*, 457 U.S. 255 (1982)..... 9

Lowenfield v. *Phelps*, 108 S. Ct. 546 (1988)..... 6

Milliken v. *Meyer*, 311 U.S. 457 (1940)..... 3n

Neuschafer v. *Whitley*, 816 F.2d 1390 (9th Cir. 1987) .. 5

Nixon v. *State*, No. DP-65 (Miss. Nov. 25, 1987)..... 9

Odom v. *State*, 483 So. 2d 343 (Miss. 1986)..... 8n

People v. *Buckley*, 44 Ill. App. 3d 1038, 358 N.E.2d 1327 (1977)..... 5n

People ex rel. Sloan v. *Lawes*, 255 N.Y. 112, 174 N.E. 80 (1930)..... 2n

PAGE

Phillips v. *State*, 421 So. 2d 476 (Miss. 1982).....7, 8, 8n, 9

Smith v. *Murray*, 106 S. Ct. 2661 (1986)..... 5

Smith v. *State*, 477 So. 2d 191 (Miss. 1985)..... 8n

State v. *Cummings*, 386 N.W.2d 468 (N.D. 1986)..... 5n

State v. *Dowd*, 478 A.2d 671 (Me. 1984)..... 5n

State v. *Edmison*, 379 N.W.2d 85 (Minn. 1985)..... 5n

State v. *Koch*, 118 N.J. Super. 421, 288 A.2d 295 (App. Div. 1972)..... 5n

Townsend v. *Burke*, 334 U.S. 736 (1948)..... 5, 5n

Underwriters National Assurance Co. v. *North Carolina Life & Accident & Health Insurance Guaranty Ass'n*, 455 U.S. 691 (1982)..... 2n

United States v. *Tucker*, 404 U.S. 443 (1972)..... 5, 5n

Wainwright v. *Goode*, 464 U.S. 78 (1983)..... 6

Wilburn v. *State*, 253 Ark. 608, 487 S.W.2d 600 (1972) 5n

Zant v. *Stephens*, 462 U.S. 862 (1983)..... 6

Constitutional Provision

U.S. Const. A. . IV, § 1 .....*passim*

Statutes

Miss. Code Ann.
§ 99-19-101 (Supp. 1987)..... 4n
§§ 99-39-1 *et seq.* (Supp. 1987)..... 8n
§ 99-39-5(2) (Supp. 1987)..... 8n
§ 99-39-21 (Supp. 1987)..... 8n

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-5468

SAMUEL BICE JOHNSON,

Petitioner,

—v.—

STATE OF MISSISSIPPI,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

REPLY BRIEF FOR PETITIONER

I.

MISSISSIPPI'S CONCESSION THAT IT WAS OBLIGED TO AFFORD FULL FAITH AND CREDIT TO THE NEW YORK COURT'S REVERSAL OF JOHNSON'S NEW YORK CONVICTION REQUIRES REVERSAL OF JOHNSON'S DEATH SENTENCE

Mississippi now concedes that the Mississippi Supreme Court was obliged to give full faith and credit to the March 24, 1987 judgment of the New York Court of Appeals reversing Johnson's 1963 New York conviction for second degree assault (Miss. Br. 11-18). In an effort to avoid the certain effect of this

concession,[1] the state offers a half-hearted and wholly perverse misreading of the opinion of the Mississippi Supreme Court, concluding that the court "clearly did" give effect to that judgment (Miss. Br. 12). In truth, the Mississippi majority could not have been plainer in its refusal to accord full faith and credit to the New York Court of Appeals decision vacating Johnson's 1963 conviction. For example, the Mississippi majority said:

- "We . . . hold that a foreign state cannot vitiate the death penalty verdict in this case by setting aside a prior conviction of a violent crime through a collateral relief petition [filed in the foreign state]." 511 So. 2d at 1338 (JA. 105).

And:

- "If we adopted Johnson's argument, the state could never use [an out-of-state] conviction as an aggravating circumstance, because of the extreme likelihood that a foreign state could overturn the prior conviction through collateral attack." 511 So. 2d at 1338 (JA. 105).[2]

And:

- "No death penalty verdict based upon this [1963 New York] conviction need be vitiated by the subsequent relief granted more than twenty years later by the New York Court of Appeals." 511 So. 2d at 1339 (JA. 106).

---

1 Under New York law, reversal of the 1963 conviction rendered that conviction a nullity and all prior proceedings void *ab initio*. *People ex rel. Sloan* v. *Lawes*, 255 N.Y. 112, 117, 174 N.E. 80, 81 (1930); *Burrell* v. *McMann*, 51 Misc. 2d 185, 188, 273 N.Y.S.2d 9, 12 (Sup. Ct. Clinton Co. 1966). It must therefore be treated as void for all purposes in Mississippi as well, if the command of the Full Faith and Credit Clause (U.S. Const. Art. IV, § 1) applies and requires Mississippi to give " 'the same credit, validity, and effect' " to the New York judgment as would " 'the state where it was pronounced.' " *Underwriters National Assurance Co.* v. *North Carolina Life & Accident & Health Insurance Guaranty Ass'n*, 455 U.S. 691, 704 (1982).

2 The xenophobic concern that states would choose to subvert their own legal processes to assure that Mississippi could not proceed with its own is offered by the Mississippi Supreme Court without the slightest support.

There is no way in which these openly defiant statements can be reconciled with the Constitution's requirement of full faith and credit.[3] The dissenters below understood as much when they pointed out that the majority had given "less than full faith and credit" to the New York decision (JA. 117). The Mississippi ruling, misapprehending New York law and misdescribing the proceedings in New York, was forthright in stating that it would not recognize the 1987 New York reversal. In language that is not in the slightest ambiguous, the Mississippi majority doubted that "the post-conviction relief proceedings in the New York courts were truly adversarial," surmised that the New York decision was motivated entirely by a desire to "vitiate the death penalty verdict" in Mississippi, and assumed that the New York prosecutor—and presumably the New York courts—had no interest in upholding Johnson's 1963 conviction. 511 So. 2d at 1338 (JA. 105). That these statements are false—as they are[4]—is not the crux of the matter. Rather, the Full Faith and Credit Clause simply forbade Mississippi to question the motive, purpose or wisdom of the New York Court of Appeals in reversing Johnson's New York conviction.

Apparently well aware that its attempted reading of the Mississippi Supreme Court ruling is facially at odds with the ruling itself, Mississippi devotes more than 30 pages of its brief to arguing that putting Johnson's now-reversed 1963 New York conviction before the jury which sentenced him to death was harmless error because the failure of one aggravating circumstance does not require resentencing in a capital case when there are other valid aggravating circumstances. This argument is

---

3 Mississippi's brief acknowledges that "the Mississippi Supreme [Court] questioned the reasoning behind and the actual procedures used in vacating the New York conviction . . ." (Miss. Br. 38). *Compare Milliken* v. *Meyer*, 311 U.S. 457, 462 (1940) ("the full faith and credit clause of the Constitution precludes any inquiry into the merits of the cause of action, the logic or consistency of the decision, or validity of the legal principles on which the judgment is based. . . . Whatever mistakes of law may underlie the judgment . . ., it is 'conclusive as to all the *media concludendi*.' ") (citations omitted).

4 *See* Brief of the Attorney General of the New York State as *Amicus Curiae* at 10-14.

foreclosed by the holding of the Mississippi Supreme Court itself that the sentencing jury's consideration of the invalid 1963 conviction could not be considered harmless. The majority ruled flatly that "[w]e eschew 'harmless error' in our reasoning . . . because the district attorney argued this particular aggravating circumstance as a reason to impose the death penalty." 511 So. 2d at 1338 (JA. 104).[5]

That determination by the court most familiar with the administration of Mississippi's death-penalty law and the temper of its juries should conclude the matter. *See Barclay v. Florida*, 463 U.S. 939, 954-56 (1983) (plurality opinion) (Rehnquist, J.).

II.

RESENTENCING IS NECESSARY WHEN A DEATH SENTENCE DEPENDS UPON AN INVALID PRIOR CONVICTION

Mississippi's brief completely avoids the second issue presented here: whether—entirely aside from the Mississippi Supreme Court's concession that the sentencing jury's consideration of Johnson's 1963 conviction could not be harmless error—a death sentence can stand when the principal aggravating circumstance is supported only by evidence of a subsequently vacated prior conviction. Mississippi argues instead that no matter what invalid aggravating circumstances are weighed by a sentencing jury in a capital case and no matter

5 The decision to eschew harmless error was a unanimous determination by the Mississippi Supreme Court, one in which the six-person majority was joined by the three dissenting justices. 511 So. 2d at 1345 (JA. 118). Both the majority and the dissenters rested their decision on the prosecutor's having argued at sentencing that the prior conviction was the principal aggravating circumstance warranting death. 511 So. 2d at 1338 & 1342 (JA. 104; 114). The jury that sentenced Johnson to death was instructed, consistent with Mississippi law, Miss. Code Ann. § 99-19-101 (Supp. 1987), to return a death sentence only if it found "that after weighing the mitigating circumstances and aggravating circumstances, one against the other, that the aggravating circumstances do outweigh the mitigating circumstances." (JA. 13-15; 17).

how prejudicial the evidence introduced to support a failed aggravating circumstance, resentencing is never required so long as at least one aggravating circumstance relied on by the jury is ultimately found to be valid (Miss. Br. 18-45).

The state's argument ignores altogether this Court's decisions in *Burgett* v. *Texas*, 389 U.S. 109 (1967), prohibiting the admission of a constitutionally infirm conviction to enhance punishment, and in *Townsend* v. *Burke*, 334 U.S. 736 (1948) and *United States* v. *Tucker*, 404 U.S. 443 (1972), holding that a sentence must be set aside when based on an invalid prior conviction or "misinformation of constitutional magnitude."[6] Those cases clearly compel the result reached by the four members of this Court who have considered the question: the introduction of "evidence that in itself represents an independent constitutional violation . . . quite clearly undermines the validity of the capital sentencing proceeding and violates the Eighth Amendment." *Smith* v. *Murray*, 106 S. Ct. 2661, 2677 (1986) (Stevens, J., dissenting). *Compare Neuschafer* v. *Whitley*, 816 F.2d 1390, 1393 (9th Cir. 1987) (Kennedy, J.) (upholding death sentence where there was no evidence that "should not have been brought to the jury's attention in the sentencing phase").

6 State courts routinely apply the *Tucker-Townsend* rule to require resentencing where a sentence depended upon an invalid prior conviction. *See, e.g.*, *Wilburn* v. *State*, 253 Ark. 608, 487 S.W.2d 600 (1972); *People* v. *Buckley*, 44 Ill. App. 3d 1038, 358 N.E.2d 1327 (1977); *State* v. *Dowd*, 478 A.2d 671 (Me. 1984); *Commonwealth* v. *Barrett*, 3 Mass. App. 8, 322 N.E.2d 89 (1975); *State* v. *Edmison*, 379 N.W.2d 85 (Minn. 1985); *State* v. *Koch*, 118 N.J. Super. 421, 288 A.2d 295 (App. Div. 1972); *State* v. *Cummings*, 386 N.W.2d 468 (N.D. 1986); *City of Pendleton* v. *Standerfer*, 297 Or. 725, 688 P.2d 68 (1984); *Baldwin* v. *State*, 499 S.W.2d 7 (Tex. Crim. App. 1973); *Haislip* v. *Morris*, 84 Wash. 2d 106, 524 P.2d 405 (1974) (*en banc*). Holdings to the same effect by the United States courts of appeals are cited at page 23 n.17 of petitioner's opening brief.

The Mississippi Supreme Court has itself acknowledged that *Townsend* "controls" in cases where "the foundation for the sentence . . . consist[s] of materially false information." *Ford* v. *State*, 437 So. 2d 13, 14 (Miss. 1983) (remanding for resentencing where 20-year manslaughter sentence was "improperly based on prejudicial and unvalidated information" relied on by sentencing judge).

Mississippi's position is based upon a misreading of *Lowenfield* v. *Phelps*, 108 S. Ct. 546 (1988). *Lowenfield* involved a death sentence based on an aggravating circumstance that duplicated an element of the offense of capital murder. The aggravating circumstance was not claimed to be invalid and was not the vehicle for introducing prejudicial evidence that was not otherwise admissible. 108 S.Ct. at 554-55.

Nor do any of the other cases relied on by Mississippi support its position. In *Zant* v. *Stephens*, 462 U.S. 862 (1983), this Court dealt with the effect under the Georgia statute of a subsequent determination that one of several statutory aggravating circumstances found by a jury was invalid because of unconstitutional vagueness. The error there was what this Court characterized as the " 'mere fact that some of the [admissible evidence was] . . . improperly designated "statutory." ' " 462 U.S. at 889 (citation omitted). The Georgia Supreme Court held the error harmless, and this Court agreed. 462 U.S. at 891. Here, however, the Mississippi Supreme Court has explicitly acknowledged that the jury's consideration of Johnson's invalid New York conviction at sentencing was *not* harmless error. *Barclay* v. *Florida*, 463 U.S. 939 (1983) (plurality opinion) (Rehnquist, J.), and *Wainwright* v. *Goode*, 464 U.S. 78 (1983) (*per curiam*), also involved harmless-error findings in cases where no unconstitutional or otherwise inadmissible evidence entered into the sentencing process. Just the opposite is true here.[7]

Samuel Johnson's death sentence was based upon the Mississippi prosecutor's repeated hammering on a 1963 New York conviction that was obtained in violation of Johnson's constitutional rights in circumstances in which the actions of New York itself made any reliable determination of guilt impossible. That conviction is now a nullity. No one should be put to death on the basis of such evidence.

---

7 Without exception, the lower court cases relied on by Mississippi (Miss. Br. 42-44) do not involve the introduction of inadmissible evidence to establish an invalid aggravating circumstance and do not address the issue of whether a death sentence can stand on the basis of such evidence.

III.

THERE IS NO VALID PROCEDURAL BAR TO THIS COURT'S REVIEW

Mississippi's brief acknowledges that the state has not previously argued that Johnson's rights are procedurally barred (Miss. Br. 48). The Mississippi Supreme Court raised the procedural bar *sua sponte* in its May 27, 1987 decision denying post-conviction relief. It said that Johnson's claim was barred because he had not challenged the validity of the 1963 New York conviction on direct appeal in 1984 or in his 1985 petition for *certiorari* following affirmance of his Mississippi conviction. The Mississippi Supreme Court did not even suggest—as is now argued by the state (Miss. Br. 53-55)—that Johnson's claim was barred because he did not object to the validity of the 1963 conviction at his 1982 trial or because he waited until 1986 to challenge that conviction in New York.

Johnson's opening brief showed that his claim cannot be procedurally barred because under *Phillips* v. *State*, 421 So. 2d 476 (Miss. 1982), a challenge to an out-of-state predicate conviction used to enhance a criminal sentence in Mississippi *must* first be successfully mounted in the state where it was entered before any relief can be had in Mississippi. In apparent recognition that the procedural bar relied on by the Mississippi Supreme Court provides no legitimate basis for depriving Johnson of relief, Mississippi has shifted ground to advance a procedural bar argument wholly different from that relied on below. Mississippi now argues that Johnson "did not, in any timely fashion, attempt to have the New York conviction overturned" and "waited for more than two years before instigating any post-conviction proceedings in New York" (Miss. Br. 55). That new contention is no more plausible than the abandoned theory it would replace.

- Mississippi cites no case or statute that could have put counsel on notice in 1982 when Johnson was tried that any challenge to the 1963 New York conviction would be time-

barred under Mississippi law unless brought within a specified period of time.[8]

• Mississippi argues that a bar did exist at the time of petitioner's direct appeal—one requiring a defendant to raise all claims arising at his trial on direct appeal—but ignores the fact that because petitioner was not required or even permitted to raise the issue now in question at his trial there was nothing to be raised on direct appeal.[9]

• Like the court below, Mississippi ignores the dictate of *Phillips* itself that challenges to a predicate conviction must be made collaterally, not at trial or on direct appeal. Defendant must first bring a proceeding "in the state in which such conviction occurred, pursuant to that state's established procedures. Should such proceeding in the foreign state succeed in overturning the conviction, then relief

8 The opinion in *Evans* v. *State*, 485 So. 2d 276 (Miss.), *cert. denied*, 476 U.S. 1178 (1986), underlines how baseless Mississippi's reliance on that decision is. Mississippi in its brief here (Miss. Br. 49-50) fails to note that Miss. Code Ann. § 99-39-21 (Supp. 1987), relied on in *Evans*, was not in effect at the time of Johnson's trial or the filing of his direct appeal, and has been held not to apply retroactively. *See, e.g., Smith* v. *State*, 477 So. 2d 191 (Miss. 1985); *cf. Odom* v. *State*, 483 So. 2d 343 (Miss. 1986). Moreover, *Phillips* squarely establishes that the validity of a prior out-of-state conviction is *not* an issue capable of determination at trial or on direct appeal in Mississippi.

9 Miss. Code Ann. § 99-39-5(2) (Supp. 1987) provides that a motion for relief under Mississippi's Uniform Post-Conviction Collateral Relief Act, Miss. Code Ann §§ 99-39-1 *et seq.* (Supp. 1987), shall be brought "within three (3) years after the time in which the prisoner's direct appeal is ruled upon by the supreme court of Mississippi," except for certain cases in which the motion can be filed even later. Johnson's conviction was affirmed by the Mississippi Supreme Court on May 8, 1985, and his motion under the Uniform Post-Conviction Collateral Relief Act was filed on August 4, 1986, only 15 months later and after he had unsuccessfully petitioned this Court for a writ of *certiorari*. The Uniform Act was, in any event, approved by the Mississippi Legislature on April 17, 1984. Mississippi wrongly asserts that the bar was in place at the time the direct appeal was filed on February 14, 1984.

should be sought in Mississippi by petition for writ of error *coram nobis.*" 421 So. 2d at 482.

That Mississippi now goes so far as to contend that the *Phillips* rule does not even apply to this capital case (Miss. Br. 51-55) illustrates all too well the only neutral principle the state seeks to apply here: this defendant must be executed, however well-founded his reliance on previously established Mississippi law. For not only has the Mississippi Supreme Court previously held that Mississippi's "habitual offender sentencing procedure resembles in all relevant respects the sentencing phase of capital crimes," *DeBussi* v. *State*, 453 So. 2d 1030, 1032 (Miss. 1984), but that court—accepting the Mississippi Attorney General's express argument—has relied upon *Phillips* to deny relief in a capital case decided *after* the decision below. *Nixon* v. *State*, ____ So. 2d ____, No. DP-65 (Miss. Nov. 25, 1987) (*en banc*). *See also* Brief of the Mississippi Public Defenders' Association as *Amicus Curiae* at 14-16. Mississippi's efforts to interpret *Phillips* in flatly inconsistent fashion in two cases in order to assure the execution of the defendant in each adds a grisly twist to the concept that "death is different." *See Hathorn* v. *Lovorn*, 457 U.S. 255, 263 (1982) (only if Mississippi "consistently relies upon . . . [a procedural bar] rule" will federal courts be denied review of constitutional claims).

In any event, neither the procedural bar rule urged by Mississippi in this Court nor the different procedural bar rule relied on by the Mississippi Supreme Court below even purports to serve a legitimate state interest. *Phillips* directs the trial courts of Mississippi not to hear evidence about the validity of an out-of-state conviction. *Accord Nixon v. State*, ____ So. 2d at ____. Without a trial record, the Mississippi Supreme Court would have nothing to decide on any direct appeal.[10] The only

10 As the Mississippi dissenters observed below:

"Johnson had no basis for the claim he asserts until he obtained the [New York Court of Appeals] order of March [24], 1987, vacating his 1963 New York conviction. Had he raised the point prior to March 24, 1987, we would no doubt have dismissed it out of hand and, consistent with the temper of the time, would probably now hold the claim barred by res judicata." 511 So. 2d at 1343 (JA. 115).

purpose of the array of after-created procedural bars doggedly interposed by Mississippi here is to prevent the consideration of Johnson's federal constitutional rights.

CONCLUSION

The judgment of the Mississippi Supreme Court should be reversed and petitioner's death sentence should be vacated.

Dated: New York, New York
April 16, 1988

Respectfully submitted,

CLIVE A. STAFFORD SMITH
SOUTHERN PRISONERS'
DEFENSE COMMITTEE
185 Walton Street, N.W.
Atlanta, Georgia 30303
(404) 688-1202

FLOYD ABRAMS
LAURENCE T. SORKIN*
MARSHALL COX
ANTHONY PADUANO
CAHILL GORDON & REINDEL
(a partnership including
professional corporations)
80 Pine Street
New York, New York 10005
(212) 701-3000

Attorneys for Petitioner
Samuel Bice Johnson

**Counsel of Record*

MOTION FILED
FEB 24 1988

No. 87-5468

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

SAMUEL BICE JOHNSON,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF OF THE MISSISSIPPI PUBLIC DEFENDERS' ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

THOMAS M. FORTNER,
President,
Mississippi Public
Defenders' Association
P.O. Box 998,
Pascagoula, Ms. 39567.
(601) 769-3058.

TABLE OF CONTENTS

MOTION FOR PERMISSION TO FILE BRIEF OF THE MISSISSIPPI PUBLIC DEFENDERS' ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER i

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

STATEMENT OF THE CASE 4

ARGUMENT 6

I. RESPONDENT CANNOT ARGUE AGAINST THE APPLICATION OF THE PHILLIPS RULE IN THIS CASE AND IN FAVOR OF ITS APPLICATION IN NIXON, FOR THE SOLE PURPOSE OF PRECLUDING THE FAIR LITIGATION OF CAPITAL DEFENDANTS' CONSTITUTIONAL RIGHTS 6

CONCLUSION 12

APPENDIX A A-1

APPENDIX B B-1

APPENDIX C C-1

No. 87-5468

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

SAMUEL BICE JOHNSON,
Petitioner,
v.
STATE OF MISSISSIPPI,
Respondent.

CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

MOTION FOR PERMISSION TO FILE BRIEF OF THE MISSISSIPPI PUBLIC DEFENDERS' ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

COMES NOW, Thomas M. Fortner, on behalf of the Mississippi Public Defenders' Association (MPDA), and moves this Court pursuant to U. S. Sup. Ct. R. 36, for permission to file a brief on behalf of the MPDA as Amicus Curiae in support of Petitioner. In support of this motion,

movant states as follows:

1. The MPDA is the official association of the Public Defenders of the State of Mississippi. Members of the MPDA therefore represent a large proportion of the State's indigent criminal defendants.

2. The MPDA believes that a brief would be helpful to this Court to set forth the law of Mississippi as it applied in Mr. Johnson's case. Respondent has taken a contradictory position in another capital case which makes Respondent's current position untenable.

3. Counsel for Petitioner have given written permission for the attached brief. However, counsel for Respondent declined such permission, thereby rendering it necessary for the MPDA to make this motion. U. S. Sup. Ct. R. 36.3.

Wherefore, premises considered, it is hereby moved that permission be granted for the MPDA to file a brief as Amicus Curiae.

Respectfully submitted,
The Mississippi Public
Defenders' Association

/s/ Thomas M. Fortner

THOMAS M. FORTNER,
President,
Mississippi Public
Defenders' Association
P.O. Box 998,
Pascagoula, Ms. 39567.
(601) 769-3058.

TABLE OF AUTHORITIES

CASES

Bandy v. State, 495 So.2d 486 (Miss. 1986) 7, 10

Burgett v. Texas, 389 U.S. 109 (1967) 8

DeBussi v. State, 453 So.2d 1030 (Miss. 1984) 9

Ellis v. State, 485 So.2d 1062 (Miss. 1986) 8

Hathorn v. Lovorn, 457 U.S. 255 (1982) 11

Henry v. Mississippi, 379 U.S. 443 (1965) 6

Johnson v. State, 511 So.2d 1333 (Miss. 1987) . . . . . passim

McLamb v. State, 456 So.2d 743 (Miss. 1984) 8

Moore v. State, 508 So.2d 666 (Miss. 1987) 7

Nixon v. State, ___ So.2d ___, No. DP-65 (Miss. Nov. 25, 1987) . 2, 3, 9

People v. Johnson, 69 N.Y.2d 339, 506 N.E.2d 1177, 514 N.Y.S.2d 324 (1987) 3, 4

Phillips v. State, 421 So.2d 476 (Miss. 1982) . . . . . passim

No. 87-5468

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

SAMUEL BICE JOHNSON,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF OF THE MISSISSIPPI PUBLIC DEFENDERS' ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The Mississippi Public Defenders' Association (MPDA), is the official association of the Public Defenders of the

State of Mississippi. As such, the members of the association are responsible for much of the representation of indigent criminal defendants in the state. The MPDA feels it appropriate that this Court should be aware of the inconsistencies in Respondent's position on the application of the rule announced in Phillips v. State, 421 So.2d 476, 481-82 (Miss. 1982), to capital cases. While arguing that the rule should not apply in this capital case -- thereby precluding relief -- Respondent has been simultaneously, and successfully, arguing that the rule should apply in another capital case -- thereby precluding relief. Nixon v. State, ___ So.2d ___, DP-65 (Miss. Nov. 25, 1987)(see Appendix A).

Respondent's contradictory arguments have an unfair effect on the MPDA's ability to enforce the constitutional rights of indigent defendants in Mississippi. Therefore the MPDA submits this brief to clarify the law of Mississippi before this Court.

SUMMARY OF ARGUMENT

The MPDA submits this brief as amicus curiae pursuant to Supreme Court Rule 36.4 in support of Samuel Bice Johnson's writ of certiorari to the Supreme Court of Mississippi. Mr. Johnson was convicted of capital murder in the Circuit Court of Pike County, Mississippi, and sentenced to die. The primary evidence introduced in aggravation at the sentencing phase was Mr. Johnson's prior New York conviction for assault in the second degree.

In Mississippi, pursuant to the rule established in Phillips v. State, 421 So.2d 476, 481-82 (Miss. 1982), no attack might be made on a facially valid prior foreign conviction at trial. Rather, the defendant must go to the state where the conviction was entered and seek relief from those courts. If successful, the defendant must subsequently file a motion for post-conviction relief to correct the sentence in Mississippi.

Mr. Johnson followed this procedure, securing relief from the New York Court of Appeals, that state's highest court. People v. Johnson, 69 N.Y.2d 339, 506 N.E.2d 1177, 514 N.Y.S.2d 324 (1987). However, when Mr. Johnson sought relief from his death sentence, the Mississippi Supreme Court created a new rule for the evaluation of prior convictions, and held Mr. Johnson procedurally barred. Johnson v. State, 511 So.2d 1333, 1336-39 (Miss. 1987).

At precisely the time that the Attorney General's Office was arguing that Mr. Johnson should be procedurally defaulted in this case because he did follow the Phillips rule, the Attorney General's Office was arguing that another death-sentenced inmate, John Nixon Sr., should be defaulted because he did not follow the Phillips rule. Indeed, six months after the decision in Mr. Johnson's case, the Mississippi Supreme denied relief to Mr. Nixon for this reason. Nixon v. State, ___ So.2d ___, DP-65 (Miss. Nov. 25, 1985) (see Appendix A).

The MPDA recognizes the State's

interest in establishing procedural rules which ensure the finality of criminal convictions. However, this interest must be fulfilled by giving litigants fair warning of procedural deadlines, and cannot simply result in the unknowing forfeiture of constitutional rights. The 'rule' established by the Mississippi Supreme Court in this case served solely to deprive Mr. Johnson of any opportunity to litigate his constitutional rights, and did not serve to ensure that claims should be timely raised.

STATEMENT OF THE CASE

In 1963, Mr. Johnson was convicted for second degree assault in Rochester, New York. Mr. Johnson was convicted on the basis of a confession which he alleged to have been exacted by coercion, through 12-16 hours of interrogation. He was denied his right to an appeal. For many years he filed diligent pro se petitions raising these issues, in an attempt to secure relief from this conviction. He was turned down at every turn. People v. Johnson, supra.

In 1982, Mr. Johnson was tried in Mississippi for capital murder. He was convicted, and at the sentencing phase the prosecution supplemented the evidence adduced at trial with what purported to be a copy of Mr. Johnson's prior conviction. This evidence was central to the penalty phase, and was argued by he prosecution throughout closing argument. Mr. Johnson was sentenced to die. Johnson v. State, 511 So.2d 1333 (Miss. 1987).

In 1986, Mr. Johnson initiated a proceeding in New York to attack the prior conviction. When the conviction was voided by the New York Court of Appeals, he introduced a certified copy of the vacatur into his motion for post-conviction relief pending before the Mississippi Supreme Court. Upon deciding the motion, however, the Mississippi Supreme Court denied Mr. Johnson relief. Johnson v. State, 511 So.2d at 1336-39.

The Court held, first, that Mr. Johnson was procedurally barred, because "[a]t no time during his direct appeal, or in his petition for certiorari to the U.S. Supreme Court did he argue his New York conviction was constitutionally invalid." Johnson, 511 So.2d at 1337. Alternatively, the Court held that "a foreign state cannot vitiate the death penalty verdict in this state by setting aside a prior conviction of a violent crime through a collateral relief petition." Id. at 1338. The justification for this rule was that otherwise there would exist the "extreme likelihood that a foreign state could overturn the prior conviction through collateral attack." Id.

The three dissenting justices criticized the Court for "tak[ing] a swipe at the New York action suggesting that the Court of Appeals' . . . order should be given less than full faith and credit." Id. at 1343 (Robertson, J., dissenting). They also noted that, "rather than raising the point [of the unconstitutionality of the prior conviction] at the sentencing phase of

the . . . action, the defendant's remedy was a separate post-conviction action which, if successful, would no doubt be the occasion for relief from his sentence . . . . Phillips, 421 So.2d at 483." Id. at 1343.

ARGUMENT

I. RESPONDENT CANNOT ARGUE AGAINST THE APPLICATION OF THE PHILLIPS RULE IN THIS CASE AND IN FAVOR OF ITS APPLICATION IN NIXON, FOR THE SOLE PURPOSE OF PRECLUDING THE FAIR LITIGATION OF CAPITAL DEFENDANTS' CONSTITUTIONAL RIGHTS.

In Johnson v. State, 511 So.2d 1333 (Miss. 1987), Petitioner claimed that the reversal of his prior New York conviction in that state required vacation of his death sentence in Mississippi, which had been predicated upon the earlier conviction. The Supreme Court of Mississippi held that Petitioner "waived this claim, and is procedurally barred. At no time during his direct appeal . . . did he argue his New York conviction was constitutionally invalid." Id. at 1337. This was a radically novel pronouncement on the part of the Court, and -- at the urging of Respondent -- has been subsequently rejected in Nixon. Therefore it cannot be said that the new 'rule' in Johnson was fairly and "clearly announced to defendant and counsel." Henry v. Mississippi, 379 U.S. 443, 448 n.3 (1965).

While the Court in Johnson stated that Petitioner should have raised the issue

prior to his direct appeal, in Phillips v. State, 421 So.2d 476 (Miss. 1982), the Mississippi Supreme Court specifically held that an accused could not litigate this issue prior to post-conviction:

> In fulfilling its mission to determine whether a prior conviction is constitutionally valid for purpose of enhancing a defendant's sentence, the trial court must not be placed in [the] position of 'retrying' the prior case. Certainly any such frontal assault upon the constitutionality of a prior conviction should be conducted in the form of an entirely separate procedure solely concerned with attacking that conviction. This role is neither the function nor the duty of the trial judge in a hearing to determine habitual offender status. Likewise, any such proceeding should be brought in the state in which such conviction occurred, pursuant to that state's established procedures. Should such a proceeding in the foreign state succeed in overturning the conviction, then relief should be sought in Mississippi by petition for writ of error coram nobis.

Id. 421 So.2d at 481-82. Accord Bandy v. State, 495 So.2d 486, 491 (Miss. 1986); Moore v. State, 508 So.2d 666, 669 (Miss. 1987). Attacks on habitual offender status have invariably been entertained on motion

for post-conviction relief. See, e.g., Ellis v. State, 485 So.2d 1062 (Miss. 1986); McLamb v. State, 456 So.2d 743 (Miss. 1984).

The rationale for Phillips[1] is set forth in the opinion, where the Court contrasted the problems inherent in permitting or requiring the accused to attack the validity of the prior foreign conviction in the Mississippi court:

> Witnesses and transcripts must be obtained. A high price in terms of time and money would be exacted from both the state and the defendant. . . . The potential difficulties inherent in [any other] position become readily apparent when viewed in the context of such factors.

Id. 421 So.2d at 480.

The Mississippi Supreme Court's attempt to distinguish the nature of the habitual offender enhancement hearing from the

---

1. Of course, the prosecution must produce the records the prior convictions, and while "the trial court is not required to go beyond the face of [the records]" Phillips, 421 So.2d at 481, this is entirely consistent with this Court's determination that the forum state must take note where "the certified records of the [prior foreign] conviction on their face raise a presumption that . . . [the] conviction was void." Burgett v. Texas, 389 U.S. 109, 114 (1967) (emphasis supplied).

capital enhancement proceeding is unconvincing, and could not have been foreseen by the defense bar. See Johnson v. State, 511 So.2d at 1337. To the contrary, in a previous decision the Court had held that Mississippi's "habitual offender sentencing procedures resembles in all relevant respects the sentencing phase of capital crimes." DeBussi v. State, 453 So.2d 1030, 1032-33 (Miss. 1984)(emphasis supplied).

Perhaps the ultimate illustration both of the novelty of the Johnson rule, and the unreasonableness of Respondent's position in this case, appears in the recent decision of Nixon v. State, ___ So.2d ___, DP-65 (Miss. Nov. 25, 1987):

> Here the Court is asked to render guidelines for determining the admissibility of prior felony records to establish aggravating circumstances under Miss. Code Ann. § 99-19-101(5)(b) (Supp. 1986). This Court has announced the . . . procedure in Phillips v. State, 421 So.2d 476 (Miss. 1982).

Id. Slip Op. at 33, Appendix A, at A-2 (emphasis supplied). This ruling came in response to the following argument made by the Attorney General in his brief to the Court, filed at the same time that Petitioner's motion for post-conviction relief was pending:

This Court, in the context of addressing the subject of enhanced punishment pursuant to Mississippi's habitual offender statute, has stated that with respect to the introduction of evidence of a defendant's prior convictions, the prosecution must show and the trial court must determine the following:

(1) the records or the prior convictions must be accurate; and

(2) the records must fulfill the requirement that the defendant sought to be sentenced is indeed the person who was previously convicted.

Phillips v. State, 471 So.2d 476, 581 [sic] (Miss. 1982); accord Bandy, 495 So.2d at 491.

Once these elements have been established, the trial court is not required to go beyond the face of the prior convictions. The trial court is not to be placed in a position of retrying a case. Consequently, the appropriate forum for an attack upon the constitutional validity of a prior conviction is a separate collateral proceeding in the state where the prior conviction occurred pursuant to that state's established procedure. Phillips, 421 So.2d at 481-82; Bandy, 495 So.2d at 491.

See Appendix B, at B-5 (Brief of Respondent, Attorney General of the State of Mississippi, in Nixon v. State, No. DP-65, filed April 29th, 1987)(emphasis supplied). In Nixon, Respondent (represented by at least one of the same counsel as in this case) was still urging this interpretation of Phillips as of January 18, 1988, just one month ago. See Appendix C, at C-1 (Appellee's Response to Petition for Rehearing, in Nixon v. State, No. DP-65, filed Januaary 18th, 1988).

The State cannot argue to this Court that Phillips does not apply here, while simultaneously arguing that Phillips does apply in Nixon, in an effort to uphold both death sentences. Neither can the majority of the Mississippi Supreme Court accept Respondent's arguments, and create two rules, thereby "invoking procedural rules that they do not apply evenhandedly to all similar claims." Hathorn v. Lavorn, 457 U.S. 255, 262 (1982).

CONCLUSION

For these reasons the novel 'rule' announced by the Mississippi Supreme Court appeared without warning to the defense bar, and -- at the behest of Respondent -- is being unfairly applied to Mr. Johnson and to no other litigant in Mississippi. Since the State procedural 'bar' therefore rests on inadequate grounds, this Court should reach the merits of Mr. Johnson's claim.

Respectfully Submitted,
The Mississippi Public
Defenders' Association

By: /s/ Thomas M. Fortner

THOMAS M. FORTNER,
President, M.P.D.A.
P.O. Box 998,
Pascagoula, Ms. 39567.

Appendix A

Excerpts From

JOHN B. NIXON, SR. v. STATE OF MISSISSIPPI

___ So.2d ___, No. DP-65

(Miss. Nov. 25, 1987)

DECIDED: NOV. 25 1987

IN THE SUPREME COURT OF MISSISSIPPI

NO. DP-65

JOHN B. NIXON, SR.

v.

STATE OF MISSISSIPPI

EN BANC:

PRATHER, JUSTICE, FOR THE COURT:

* * *

XV.

During the penalty phase of Nixon's trial, the State sought to introduce as an aggravating circumstance Nixon's prior felony conviction "involving the use or threat of violence to the person." See, Miss. Code Ann. § 99-19-101(5)(b) (Supp. 1986). Defense counsel objected to the introduction of the prior conviction on grounds that the record was not given to the defeendant as part of the aggravating circumstance material 4/ and that the prior

---

4 Defense counsel admitted the prior record was tendered to them. They simply argued that the record was not highlighted as being for the purpose of an aggravating circumstance.

record reflected the name "John B. Nixon" instead of "John B. Nixon, Sr." Nixon's objections were overruled.

The prior conviction introduced by the State was a 1958 Texas rape conviction in which Nixon pled guilty and was sentenced to fifteen years in prison. On appeal, Nixon contends the introduction of prior rape conviction was error because (A) the prior conviction was for a non-violent "statutory rape" and (B) the prior conviction was facially invalid.

Initially the State contends these points are procedurally barred because they were not the subject of Nixon's trial objections. Notwithstanding the absence of objetions on the specific points raised on appeal, this Court proceeds to the merits.

* * *

B.

Was the Prior Conviction Facially Invalid?

Here the Court is asked to render guidelines for determining the admissibility of prior felony records to establish aggravating circumstances under Miss. Code Ann. § 99-19-101(5)(b) (Supp. 1986). This Court has announced the following procedure in Phillips v. State, 421 So.2d 476 (Miss. 1982).

In Phillips, the prosecution sought to

use a prior Kentucky conviction to enhance the defendant's punishment under Miss. Code Ann. § 99-19-81, as amended. The defendant objected to the use of the Kentucky conviction alleging that the conviction was invalid because he had not "knowingly and voluntarily" pled guilty. In response to Phillips' argument, this Court held that the trial judge is not required to go beyond the face of prior convictions sought to be used in establishing a defendant's status as an habitual offender. "If, on its face, the conviction makes the proper showing that a defendant's prior plea of guilty was both knowing and voluntary, that conviction may be used for the enhancement of the defendant's punishment under the Mississippi Habitual Offender Act." Phillips, 421 So.2d at 481. See also, Moore v. State, No. 56,885 (Miss. June 3, 1987) (not yet reported).

In the instant case the record reflects that:

> John B. Nixon in open court, in person, pleaded guilty to the charge contained in the indictment, thereupon the said Defendant was admonished by the Court of the consequences of said plea, and the said Defendant persisted in pleading guilty; and it plainly appearing to the Court that the said Defendant is sane, and that he is uninfluenced in making said plea by any consideration of fear, or by any persuasion, or delusive hope of pardon prompting him to confess his

guilt, the said plea of guilty is by the Court received and here not entered of record upon the minutes of the Court as the plea herein of said Defendant.

C.

If the Court had found that the introduction of Nixon's prior rape conviction as an aggravating circumstance was improper, Nixon contends his death sentence must be reversed. This Court has rejected that argument.

Relying on Fant [sic] v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), this Court has held numerous times that where a death penalty is supported by several aggravating circumstances, the invalidity of one of those circumstances will not constitutionally impair the sentence. See e.g., Stringer v. State, 500 So.2d 928, 945 (Miss. 1986); Irving v. State, 498 So.2d 305, 314 (Miss. 1986).

In the instant case, the jury found two other aggravating circumstances -- (1) the capital offense was committed for pecuniary gain and (2) the capital offense was especially heinous, atrocious and cruel.

* * *

AFFIRMED. WEDNESDAY, DECEMBER 16, 1987, SET FOR EXECUTION OF THE DEATH PENALTY.

Appendix B

Excerpts From

BRIEF OF APPELLEE, STATE OF MISSISSIPPI

JOHN B. NIXON, SR., v. STATE OF MISSISSIPPI

No. DP-65, March 1987 Term

(Filed April 29, 1987)

IN THE SUPREME COURT OF MISSISSIPPI

MARCH 1987 TERM

JOHN B. NIXON, SR. APPELLANT

VERSUS DP- 65

STATE OF MISSISSIPPI APPELLEE

BRIEF OF APPELLEE

* * *

PROPOSITION II.

THE TRIAL COURT PROPERLY ALLOWED THE INTRODUCTION OF APPELLANT'S 1958 GUILTY PLEA INTO EVIDENCE DURING THE PENALTY PHASE OF THE TRIAL

Prior to the initiation of the penalty phase of the trial, counsel for Appellant, during a conference in chambers, objected to the admissibility of Appellant's 1958 Texas conviction for rape on the following grounds: (a) the prior conviction was not given to counsel "as part of aggravating circumstances as ordered in the discovery order"; and (b) "the record does not show John B. Nixon, Sr. [;] [i]t just shows John B. Nixon." (R. Vol. I, 534, 536).

Counsel for Appellant acknowledged they received the prior conviction from the State

in its discovery response. The basis of the objection was that the State failed to "highlight" the fact that the prior conviction would be used as an aggravating circumstance during the penalty phase of the trial. Additionally, Appellee notes that the record of Appellant's prior conviction contained a photograph of him and his fingerprints. Consequently, the records furnished a presumption of his identity which could have been easily overcome if noteworthy. Course v. State, 461 So.2d 771 (Miss. 1984). However, this avenue was not pursued.

During the penalty portion of the trial, when the State moved to offer the prior conviction into evidence, counsel opposite renewed their previous objection. (R.Vol.IV., 540-541). Said motion was duly noted and overruled. [R.Vol.IV, 541].

However, during the hearing on Appellant's motion for new trial, counsel asserted that the prior conviction should not have been admitted because it was over ten (10) years old. Counsel relied upon Rule 609 (b), Mississippi Rules of Evidence.

Appellee notes that none of these theories are asserted here on appeal. Instead, Appellee seeks to attack the validity of the prior conviction on two alternate theories, to wit, the prior conviction is not for a violent felony and it is facially invalid. The recitation of the facts above makes it readily apparent that these theories were not presented to the court below. This Court has held that

an objection may not be made upon one ground in the lower court and be presented upon an entirely different theory on appeal. Anderson v. State, 171 Miss. 41, 156 So. 645, 647 (1934); accord, Daumer v State, 381 So.2d 1014, 1017 (1980). Thus, Appellant having failed to raise the above referenced theories in the court below is procedurally barred from raising the same on appeal.

Assuming, for argument only, these claims were properly preserved for appeal, Appellee submits they are without merit.

The record reflects that on April 9, 1958, Appellant was indicted for the offense of rape. (R.Vol.IV, 549-550). Specifically, the indictment charged that Appellant, having made an assault upon a female under the age of eighteen (18), did ravish and have carnal knowledge of her. [R.Vol.IV, 549].

On May 12, 1958, Appellant in open court pled guilty to the charge in the indictment. Moreover, a jury, having heard the indictment read; Appellant's plea of guilty; and evidence of the charge submitted by the State, found him guilty of the charge of rape and he was duly sentenced to a term of fifteen (15) years imprisonment. (R.Vol.IV, 544-545).

It is a well settled fact of jurisprudence within the state of Texas that "[t]he word "ravish" implies force and want of consent, and its use in the indictment in connection with the allegation of the rape

of a female between the ages of 15 and 18 years, as here, renders the indictment sufficient to support a conviction for rape by force as well as for statutory rape." Rodriquez v. State, 308 S.W.2d 39, 40 (1957) (citation omitted).

Significantly, Appellant, as previously mentioned, did not object to the introduction of this prior conviction on the grounds that it did not involve the use of violence against the person. Surely, if the offense had been committed without the use of force, that fact would have been the most apparent and readily available ground for objection to the introduction of this prior conviction. Appellant fails to point to anything in the record which would indicate that his prior conviction was not for rape by force. This Court has held evidence that a defendant had a prior conviction for rape, a crime of violence to the person, is admissible in the sentencing phase of a capital murder trial. Johnson v. State, 476 So.2d 1195 (Miss. 1985). Appellee notes this Court has, in the absence of a legislative standard, adopted the rationale that a separate standard of determining violence applies when the victim is a child. Bandy v. State, 495 So.2d 486, 492 (Miss. 1986).

Further, there is nothing in the record to indicate that the guilty plea to the rape charge was facially invalid. The record shows that the Appellant, having been advised of the consequences, knowingly and voluntarily pled guilty. [R.Vol.IV, 544,551]. Appellant's bold claim that the

prior conviction is "presumptively" invalid and that the State must, beyond a reasonable doubt, prove its validity is meritless and a blatant misrepresentation of the law.

This Court, in the context of addressing the subject of enhanced punishment pursuant to Mississippi's habitual offender statute, has stated that with respect to the introduction of evidence of a defendant's prior convictions, the prosecution must show and the trial court must determine the following;

> (1) the records of the prior convictions must be accurate; and
>
> (2) the records must fulfill the requirement that the defendant sought to be sentenced is indeed the person who was previously convicted.

Phillips v. State, 471 So.2d 476, 581 (Miss. 1982): accord Bandy, 495 So.2d at 491.

Once these elements have been established, the trial court is not required to go beyond the face of the prior convictions. The trial court is not to be placed in a position of retrying a case. Consequently, the appropriate forum for an attack upon the constitutional validity of a prior conviction is a separate collateral proceeding in the state where the prior conviction occured pursuant to that state's established procedure. Phillips, 421 So.2d at 481-482; Bandy, 495 So.2d at 491.

During the penalty phase of the trial, the prosection affirmatively showed and the trial court duly found that the record of the prior conviction was accurate and that Appellant was the person who had been previously convicted. (R.Vol.IV, 536, 542-553). Accordingly, applying the above referenced rationale, the trial court was not required to go beyond the face of the prior conviction.

Finally, Appellant argues that the introduction of an invalid aggravating circumstance in this case voids the sentence of death. The primary authority urged in support of this claim is Florida case law as interpreted in Barclay v. Florida, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983). Basically, Appellant argues that Zant v. Stephens, 467 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), which provides that a death sentence need not be reversed for failure of a single aggravating factor where other valid factors are found to exist, does not apply in states which employ a weighing process (aggravating factors to mitigating factors) precedent to sentence.

This Court has always held that a death sentence may rest upon a single valid statutory aggravating factor. Stringer, 300* So.2d 928 (Miss. 1986), Edwards v. State, 441 So.2d 54 (Miss. 1983), Tokman v. State, 435 So.2d 664 (Miss. 1983), Evans v.

---

*. Editor's note: The correct citation is Stringer v. State, 500 So.2d 928 (Miss. 1986).

State, 442 So.2d 737 (Miss. 1982). This court has further held in accord with Zant that where a death sentence "is based on more than one aggravating circumstance, invalidation of one may not invalidate the entire sentence." Irving v. State, 498 So.2d 314 (Miss. 1986); Stringer v. State, supra at 945. The fact that Mississippi law contains a weighing process does not dictate a different result. Irving and Stringer are in full accord with federal precedent. Barclay does not dictate a different result.

In sum, Barclay holds constitutional the Florida system of finding harmless the inclusion of an improper aggravating factor in the absence of any mitigating factors. This holding does not, however, state that such an approach is a necessary component of any capital sentencing scheme which includes the feature of "weighing." Federal courts have so noted. Williams v. Maggio, 679 F.2d 381 (5th Cir. 1982), cert. den. 463 U.S. 1214 (1983); Moore v. Maggio, 740 F.2d 308, 321 (5th Cir. 1984) (rejecting claim that submission of invalid aggravating circumstances "skewed the balance" struck by jury in voting for death); Knighton v. Maggio, 740 F.2d 1344, 1351 (5th Cir. 1984); Watson v. Blackburn, 756 F.2d 1055, 1057-58 (5th Cir. 1984); Martin v. Maggio, 711 F.2d 1273, 1283-84 (5th Cir. 1983), cert. denied ___ U.S. ___, 83 L.Ed.2d 373, 105 S.Ct. 447 (1984). In the wake of Barclay, the United States Supreme Court has dismissed the presence of possible mitigating factors as the pivotal question in reviewing a claim that failure of an aggravating factor automatically skews the weighing process.

In Wainwright v. Goode, 464 U.S. 78, 104 S.Ct. 378, 78 L.Ed.2d 187 (1983), the sentencer (the trial Judge):

> found that three statutory aggravating circumstances had been proved beyond a reasonable doubt. He also found two mitigating circumstances but determined that they did not outweigh the aggravating circumstances.
> (78 L.Ed.2d at 190).

Further interpretation of Goode has resulted in findings that "the existence of mitigating circumstances no longer is of importance" in understanding Barclay. Alford v. Wainwright, 725 F.2d 1282 (11th Cir. 1984).* Alternatively put, the United States Supreme Court in Goode extended its holding in Barclay to cover cases in which the trial judge finds mitigating factors to exist." Alvord, 725 F.2d at 1286, n.4. See also Collins v. Francis, 728 F.2d 1322, 1342 (11th Cir. 1984). Consequently, Barclay as explicated through Goode does not necessitate the absence of mitigating factors as a foundation for upholding a death sentence in the face of a single improper aggravating factor.

In summary, the state contends this question is pretermitted because the

---

*. Editor's note: The correct name of the case is Alvord v. Wainwright, 725 F.2d 1282 (11th Cir. 1984).

aggravating factors of pecuniary gain; heinous, atrocious, and cruel; and prior conviction of a violent felony, were properly sumbitted to and found by the jury. Assuming any factor was in any way improper, state and federal law allow the sentence of death to stand.

* * *

Appendix C

Excerpts From

Appellee's Response to Petition
for Rehearing

John B. Nixon, Sr. v. State of Mississippi

___ So.2d ___, No. DP-65

(Filed, 18th January, 1988)

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
SEPTEMBER 1987 TERM

JOHN B. NIXON, SR. — APPELLANT

VERSUS — NO. DP-65

STATE OF MISSISSIPPI — APPELLEE

APPELLEE'S REPONSE TO PETITION FOR REHEARING

* * *

III.

APPELLANT'S 1958 GUILTY PLEA WAS PROPERLY ADMITTED AS PROOF OF A PRIOR CONVICTION OF A VIOLENT FELONY

* * *

Appellant's contention that the 1958 guilty plea was facially invalid is unpersuasive in that it met the guidelines established by this Court in Phillips v. State, 421 So.2d 476 (Miss. 1983) for determining the admissibility of prior felony records to be used to enhance punishment. See also Bandy, supra. Further, pursuant to a long line of cases adopting the rationale enunciated in Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), even if the introduction of the prior conviction as an aggravating circumstance was improper, it doesn't

warrant the reversal of his sentence of death. See e.g., Stringer v. State, 500 So.2d 928 (Miss. 1986); Irving v. State, 498 So.2d 305 (Miss. 1986); Johnson v. State, DP-43, ___ So.2d ___ (Miss. May 27, 1987) (not yet reported); Faraga v. State, supra.

* * *

Certificate

I hereby certify that I have this day mailed, by Federal Express, a copy of the aforegoing document to the following:

Marvin L. White, Jr.
Assistant Attorney General,
P.O. Box 220,
Jackson, Ms. 39205.

This the 24th day of February, 1988.

/s/ Thomas M. Fortner

MOTION FILED
FEB 25 1988

FILED
FEB 25 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-5468

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SAMUEL BICE JOHNSON,

Petitioner,

vs.

THE STATE OF MISSISSIPPI,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

ROBERT ABRAMS
Attorney General of the State of New York
120 Broadway
New York, New York 10271
(212) 341-2018

O. PETER SHERWOOD
Solicitor General

SUZANNE M. LYNN
SUSAN JACOBS
BARRY BASSIS
Assistant Attorneys General Of Counsel

TABLE OF CONTENTS

	Page
Table of Authorities	iii
Interest of the Amicus	1
Statement of the Case	2
Summary of Argument	5
Argument	6
Conclusion	17

TABLE OF AUTHORITIES

Page

CASES

Bennett v. State, 476 S.W.2d 281 (Tex. Crim. App. 1972) 9

Burrell v. McMann, 51 Misc. 2d 185 (N.Y. Sup. Ct. 1966) 14

Butler v. Eaton, 141 U.S. 240 (1891) 15

Commonwealth ex rel. Marshall v. Gedney, 478 Pa. 299, 386 A.2d 942 (1978) 16

Cottington's Case, 30 Car. 2 (June 10, 1678) 7

DeNato v. Finch, 436 F.2d 737 (3d Cir. 1971) ... 15

Farmland Dairies v. Barber, 65 N.Y.2d 51, 478 N.E.2d 1314, 489 N.Y.S.2d 713 (1985) ..... *passim*

Gelb v. Royal Globe Ins. Co., 798 F.2d 38 (2d Cir. 1986), *cert. denied*, 107 S.Ct. 1608 (1987) 15, 16

Huntington v. Attrill, 146 U.S. 657 (1892) 9

Jackson v. Denno, 378 U.S. 368 (1964) 13

Imbler v. Pachtman, 424 U.S. 409 (1976) 16, 17

Johnson v. Mississippi, 106 S.Ct. 2930 (1986) 3

Johnson v. Muelberger, 340 U.S. 581 (1951) 7

Johnson v. State, 477 So. 2d 196 (Miss. 1985), *cert. denied*, 106 S. Ct. 1958 (1986), *reh'g denied*, 106 S. Ct. 2930 (1986) 3, 11

Johnson v. State, 511 So. 2d 1333 (Miss. May 27, 1987) (opinion of Mississippi Supreme Court denying motion for post conviction relief) 3

Page

Johnson v. State, 511 So. 2d 1333 (Miss. July 15, 1987) (order of Mississippi Supreme Court denying motion for post conviction relief 5, 16

Kennedy v. Cassillis, 2 Swans. 313, 36 Eng. Rep. 635 (1818) 7

Lockett v. Ohio, 438 U.S. 586 (1978) 16

Michigan v. Doran, 439 U.S. 282 (1976) 8

Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75 (1984) 14

Milliken v. Meyer, 311 U.S. 457 (1941) 6, 10, 11

Milwaukee County v. M. E. White Co., 296 U.S. 268 (1935) 6, 8

Nelson v. George, 399 U.S. 224 (1970) 9

No East-West Highway Committee, Inc. v. Chandler, 767 F.2d 21 (1st Cir. 1985) 15

People v. Callaway, 24 N.Y.2d 127, 247 N.E.2d 128, 299 N.Y.S.2d 154 (1969) 10, 13

People v. Carpenteur, 21 N.Y.2d 571, 236 N.E.2d 850, 289 N.Y.S.2d 615 (1968) 10

People v. Cooks, 67 N.Y.2d 100, 500 N.Y.S.2d 503, 491 N.E.2d 676 (1986) 14

People v. Hairston, 10 N.Y.2d 92, 176 N.E.2d 90, 217 N.Y.S.2d 77 (1961) 13

People v. Huntley, 15 N.Y.2d, 255 N.E.2d 838, 204, N.Y.S.2d 179 (1965) 13

Page

People v. Johnson, 69 N.Y.2d 339, 506 N.E.2d 1177, 514 N.Y.S.2d 324 (1987) (per curiam), *rev'g* 125 A.D.2d 1008, 509 N.Y.S. 789 (4th Dept. 1986) ..... *passim*

People v. Lucci, 27 N.Y.2d 550, 261 N.E.2d 263, 313 N.Y.S.2d 121 (1970) 1

People v. Montgomery, 24 N.Y.2d 130, 247 N.E.2d 130, 299 N.Y.S.2d 156 (1969) 1, 11, 12

People v. Rivera, 39 N.Y.2d 519, 349 N.E.2d 825, 384 N.Y.S.2d 726 (1976) 12, 13

People v. Thomas, 47 N.Y.2d 37, 389 N.E.2d 1094, 416 N.Y.S.2d 573 (1979) 12

People v. Willis, 79 A.D.2d 1036, 435 N.Y.S.2d 38 (2d Dep't 1981) 10

People v. Willkins, 28 N.Y.2d 213, 269 N.E.2d 803, 321 N.Y.S.2d 87 (1971) 10

Phillips v. State, 421 So. 2d 476 (Miss. 1982) 4, 10

Puerto Rico v. Branstad, 107 S. Ct. 2801 (1987) .. 8

Smith v. Crouse, 298 F. Supp. 1029 (D. Kan. 1968), *aff'd*, 413 F.2d 929 (10th Cir. 1969) 9

Wisconsin v. Pelican Insurance Co., 127 U.S. 265 (1888) 9

Zant v. Stephens, 462 U.S. 862 (1983) 16

CONSTITUTION, STATUTES, REGULATIONS AND RULES

U.S. Const. art. IV § 1 6

28 U.S.C. § 1738 (1982) 8

	Page
Fed. R. Civ. P. 60(b)(5)	15
New York Criminal Procedure Law § 400.20 (McKinney 1983)	10
§ 440.10 (McKinney 1983)	13, 14
§ 460.10(1)(a) (McKinney 1983)	3
§ 460.30 (McKinney 1983)	11
Art. 460 (McKinney 1983)	3
New York Executive Law § 63 (McKinney 1982)	1
Sup. Ct. R. 36.4	1
OTHER SOURCES	
Articles of Confederation, Art. IV	7
Bellacosa, McKinney's Consolidated Law of New York Annotated, Practice Commentaries to Criminal Procedure Law §§ 440.10, 460.30 (1983)	11
Finkelman, P., *An Imperfect Union* (1981)	8
Restatement (Second) of Judgments (1982)	15
Sumner, *The Full Faith and Credit Clause - Its History and Purpose*, 34 Or. L. Rev. 224 (1955)	7
Vestal, *Criminal Prosecutions: Issue Preclusion and Full Faith and Credit*, 28 Kan. L. Rev. 1 (1979)	9
C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* (1981)	15

No. 87-5468

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SAMUEL BICE JOHNSON,

Petitioner,

vs.

THE STATE OF MISSISSIPPI,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*

The State of New York, by its Attorney General, Robert Abrams, submits this brief *amicus curiae* pursuant to Supreme Court Rule 36.4 in support of Samuel Bice Johnson's request for resentencing. As chief legal officer of the State under New York Executive Law § 63, (McKinney 1982) the Attorney General urges this Court to adopt the interpretation of the full faith and credit clause set forth in *Farmland Dairies v. Barber*, 65 N.Y.2d 51, 478 N.E.2d 1314, 484 N.Y.S.2d 713 (1985), which requires each state to recognize other states' vacaturs and other

limitations on their criminal judgments. Accordingly, Mississippi is precluded from basing a death penalty on a New York conviction which has been vacated by the New York Court of Appeals.

Because the consequences of Mississippi's refusal to recognize the validity of the New York court's vacatur are so grave and because the reasons for the refusal call into question the integrity of the New York court proceedings, the Attorney General submits this brief in order to clarify the record before this Court.

Statement of the Case

In 1963, Samuel Bice Johnson, then a resident of Monroe County, New York, was convicted of assault in the second degree. He was sentenced to a prison term of 1 1/2-3 years and served one year before being paroled. Johnson was not advised at sentencing by either his lawyer or the court of his right to appeal, a failure which under New York law entitles a defendant to resentencing so he may appeal. *People v. Montgomery*, 24 N.Y.2d 130, 247 N.E.2d 130, 299 N.Y.S.2d 156 (1969).[1]

When he discovered that he had the right to appeal, Johnson repeatedly petitioned for permission to do so, but his attempts were thwarted several times. *People v. Johnson*, 69 N.Y.2d 339, 341, 506 N.E.2d 1177, 1178, 514 N.Y.S.2d 324, 325. In 1967, he filed a *pro se* notice of appeal. (A. 1).[2] This notice was dismissed by a court clerk in Monroe County who deemed the notice "untimely," not knowing that Johnson had not initially been advised of his right to appeal. (A. 2).

Between 1967 and 1971, Johnson filed two *pro se* petitions alleging a denial of his right to appeal. These applications were denied, and Johnson filed a notice of appeal from one of these

[1] The New York Court of Appeals has applied *Montgomery* retroactively. *People v. Lucci*, 27 N.Y.2d 550, 261 N.E.2d 263, 313 N.Y.S.2d 121 (1970).

[2] "A." references are to documents appended to New York's brief in support of Mr. Johnson's petition for certiorari.

denials. (A. 3-10). The Monroe County public defender's office was appointed to represent Johnson on the appeal, but that office never perfected the appeal, a failure which it later admitted. (A. 11).

In 1982, in Mississippi, Johnson was convicted of capital murder and sentenced to death. The jury found three aggravating circumstances justifying imposition of the death penalty, but the one relied on most heavily by the prosecution was Johnson's 1963 assault conviction in New York.[3] Thus, as it stood in 1982, Johnson's 1963 conviction was the unappealed judgment of a trial court.[4]

After Johnson's conviction and sentence were affirmed on direct appeal by the Mississippi Supreme Court, *Johnson v. State*, 477 So. 2d 196 (Miss. 1985), he petitioned this Court for a writ of certiorari which was denied. *Johnson v. Mississippi*, 106 S. Ct. 2930 (1986).

On August 4, 1986, Johnson filed a motion for post-conviction relief in the Mississippi Supreme Court. On the same day, the Mississippi Supreme Court granted a stay of execution. Simultaneously, Johnson again attacked his New York conviction in the New York courts.

On March 24, 1987, in a per curiam opinion, the New York Court of Appeals vacated Johnson's 1963 conviction and dismissed the underlying indictment, holding that he had been denied his constitutional right to appeal:

[3] The Mississippi Supreme Court said that the admission of the assault conviction as an aggravating circumstance could not be considered harmless error since it was heavily relied upon by the prosecutor in seeking the death penalty. *Johnson v. State*, 511 So. 2d 1333, 1338 (Miss. 1987).

[4] Article 460 of the New York Criminal Procedure Law (McKinney 1983) governs the taking and perfecting of appeals. In an appeal as of right, Johnson would have had to file a notice of appeal within 30 days of the imposition of his sentence. N.Y. Crim. Proc. Law § 460.10(1)(a) (McKinney 1983). N.Y. Crim. Proc. Law § 460.30 (McKinney 1983) provides for extensions of time for taking an appeal. As of 1986, however, Johnson's notice of appeal had not been filed.

> It is undisputed that defendant was never advised of his right to appeal from the assault conviction and that, upon discovering that right, he made several timely and diligent *pro se* attempts to obtain review of the judgment through the avenues available to him at the time. Further, it is undisputed that the actions of this State prevented defendant from ever obtaining the review of the conviction to which he was entitled.

People v. Johnson, 69 N.Y.2d 339, 341, 506 N.E.2d 1177, 1178, 514 N.Y.S.2d 324, 325 (1987).

Additionally, New York's highest court concluded that the interests of justice would not be served by a new trial since "the records of defendant's trial have been lost, . . . neither reconstruction nor a new trial is possible and . . . defendant has raised appealable issues with possible merit." 69 N.Y.2d at 342, 506 N.E.2d at 1178, 514 N.Y.S.2d at 325.

On March 26, 1987, Johnson transmitted a certified copy of the New York Court of Appeals' decision vacating his 1963 conviction and dismissing the indictment to the Mississippi Supreme Court. In so doing, Johnson was following Mississippi law. To determine if a prior conviction in another state is constitutionally valid, Mississippi law requires a defendant to challenge the conviction in the other state:

> [A]ny such proceeding should be brought in the foreign state in which such conviction occurred, pursuant to the state's established procedures. Should such proceeding in the foreign state succeed in overturning the conviction, then relief should be sought in Mississippi by petition for writ of error coram nobis.

Phillips v. State, 421 So. 2d 476, 481-82 (Miss. 1982).

On May 27, 1987, a divided Mississippi Supreme Court held that despite New York's vacatur of the 1963 conviction, Johnson was not entitled to resentencing. *Johnson v. State*, 511 So. 2d

1333 (1987). The court held that "a foreign state cannot vitiate the death penalty verdict in this state by setting aside a prior conviction of a violent crime through a collateral relief petition." *Id.* at 1338. Further, the Mississippi court found that the New York proceedings were not "adversarial" because the State's attorney had "no significant interest or concern in vouchsafing the validity of his [Johnson's] 1963 conviction." *Id.*

In a dissenting opinion joined by two judges, Justice Robertson criticized the majority for "tak[ing] a swipe at the New York action suggesting that the Court of Appeals' March 24, 1987 order should be given less than full faith and credit." *Id.* at 1343. The dissenting opinion concluded that "vitiation of Johnson's 1963 New York conviction undermines confidence in the outcome of the penalty phase of his capital murder trial." *Id.* at 1345.

The Mississippi Supreme Court denied petitioner's request for rehearing on July 15, 1987. *Johnson v. State*, 511 So. 2d 1333 (Miss. 1987). This Court granted certiorari on January 11, 1988.

Summary of Argument

Full faith and credit considerations require that if a state chooses to use another state's convictions to enhance its criminal penalties, it must give equal recognition to a sister state's vacaturs. Although New York consistently follows this constitutional principle, Mississippi violates this doctrine by seeking to base a penalty of death upon a New York conviction which has been vacated by the New York Court of Appeals.

Mississippi violated the fundamental rule that one state may not question the legal principles or reasoning of the courts of another state. To avoid recognizing the vacatur of the New York conviction, Mississippi relied on such irrelevant facts as the Mississippi court's mistaken belief that the New York reversal was on collateral attack rather than on direct appeal, Mr. Johnson's having served his sentence on the 1963 conviction, and the twenty year lapse between the conviction and the reversal by the New York Court of Appeals. The Mississippi court

attacked not only the integrity of the New York proceedings but even urged that the New York prosecutor was not sufficiently adversarial.

Mississippi's reliance on an invalidated New York conviction to support a sentence of death mandates a resentencing.

ARGUMENT

THE MISSISSIPPI SUPREME COURT'S REFUSAL TO GIVE EFFECT TO THE NEW YORK COURT OF APPEALS' VACATUR OF A NEW YORK CONVICTION VIOLATES THE FULL FAITH AND CREDIT CLAUSE

Article IV, § 1 of the United States Constitution declares that "Full Faith and Credit shall be given in each State to the Public Acts, Records and Judicial Proceedings of every other State." Mississippi's use of a New York conviction which New York courts have vacated, as a basis for the death penalty, violates this clause of the Constitution. Mississippi went behind the face of the New York judgment of vacatur in violation of the full faith and credit clause. The judgment was valid on its face and was issued by a court which had jurisdiction over the matter and the parties. "In such case the full faith and credit clause of the Constitution precludes any inquiry into the merits of the cause of action, the logic or consistency of the decision, or the validity of the legal principles on which the judgment is based . . . ." *Milliken v. Meyer*, 311 U.S. 457, 462 (1941).

By its action attacking the validity of the New York decision, Mississippi causes friction within the federal system. This Court has repeatedly underscored the importance to national unity of following the mandates of the full faith and credit clause. In *Milwaukee County v. M. E. White Co.*, 296 U.S. 268 (1935), Chief Justice Stone declared:

> The very purpose of the full faith and credit clause was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others and to make them integral parts of a single nation.

296 U.S. at 276-277. *See also Johnson v. Muelberger*, 340 U.S. 581, 584 (1951) (purpose of the clause is to "help weld the independent states into a nation by giving judgments within the jurisdiction of the rendering state the same faith and credit in sister states as they had in the state of the original forum").

The constitutional provision was adopted to change the tendency of the colonies to function as separate nations. In fact, the recognition by a sovereign of the validity of another sovereign's judgment was a principle of English common law. As early as 1678, an English court gave conclusive effect to the judgment of a foreign state:

> [I]t is against the law of nations not to give credit to the judgments and sentences of foreign countries, till they be reversed by the law, and according to the form, of those countries wherein they were given. For what right hath one Kingdom to reverse the judgment of another? . . . And what confusion would follow in Christendom, if they should serve us so abroad, and give no credit to our sentences.

Cottington's case, 30 Car. 2 (June 10, 1678) (cited in *Kennedy v. Cassillis*, 2 Swans. 313, 326, 36 Eng. Rep. 635, 640 (1818)). But despite the English practice, before the American Revolution, most of the colonies used the judgments of other sovereignties only as evidence that such judgments existed.[5] To insure this new unity, the drafters of the Articles of Confederation included a full faith and credit provision.[6] The constitutional convention of 1787 extended that provision to include nonjudicial public acts and records and gave Congress the power

---

[5] J. Sumner, *The Full Faith And Credit Clause – Its History and Purpose*, 34 Or. L. Rev. 224, 226 (1955).

[6] "Full faith and credit shall be given in each of these States to the records, acts and judicial proceedings of the courts and magistrates of every other State." Articles of Confederation, art. IV.

to "prescribe the manner in which such acts, records and proceedings shall be proved and the effect thereof."[7]

All of article IV concerns the relations between the States. The individual clauses – privileges and immunities, extradition,[8] and full faith and credit – provide the mechanisms for achieving the cohesion of separate states. The wisdom of these constitutional principles is illustrated by the results when states ignore them. Disregard of other states' judgments and laws by a forum state historically leads to breakdowns in the national system. One commentator suggests that the breakdown of comity among states was a contributing factor to the civil war. *See* P. Finkelman, *An Imperfect Union* 8 (1981).

Mississippi's refusal to respect other states' penal judgments, in contrast to its right to refuse to enforce a sister state's criminal laws, threatens to disrupt established national criminal practices. This Court has carefully distinguished between enforcement and recognition of another state's tax law judgments. *Milwaukee County v. M. E. White Co.*, 296 U.S. 268 (1935). In that case, this Court held that even assuming that one state

---

[7] The current version of the statute is 28 U.S.C. § 1738 (1982).

[8] The extradition clause accords full faith and credit to sister states' criminal judgments.

> The extradition clause articulated in mandatory language the concepts of comity and full faith and credit found in the immediately preceding clause of article IV. In the administration of justice, no less than in trade and commerce, national unity was thought to be served by de-emphasizing state lines for certain purposes without infringing on essential state authority.

Michigan v. Doran, 439 U.S. 282, 287 (1978) (Burger, C.J., Blackmun, and Marshall, J.J., concurring in the result). This Court, in an opinion by Marshall, J., reemphasized this theme of mandatory recognition for other states' penal judgments regarding extradition in *Puerto Rico v. Branstad*, 107 S. Ct. 2801, 2807 (1987) (upon proper demand by a governor of a foreign state, sister state had no discretion in ordering extradition of person criminally charged).

does not have to recover taxes levied under the statute of another, it must still give full faith and credit to judgments for such taxes. *See also Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265 (1888). The same principles extend to penal law judgments. *See, e.g., Smith v. Crouse*, 298 F. Supp. 1029, 1036-37 (D. Kan. 1968), *aff'd*, 413 F.2d 969 (10th Cir. 1969); *Bennett v. State*, 476 S.W.2d 281, 283 (Tex. Crim. App. 1972); *see also* Vestal, *Criminal Prosecutions: Issue Preclusion and Full Faith and Credit*, 28 Kan. L. Rev. 1, 21-22 (1979). This is in contrast to the rule that sister states are not required to enforce a foreign penal judgment. *Nelson v. George*, 399 U.S. 224, 229 (1970); *Huntington v. Attrill*, 46 U.S. 657 (1882).

We believe the decision of the New York Court of Appeals in *Farmland Dairies v. Barber*, 65 N.Y.2d 51, 478 N.E.2d 1314, 484 N.Y.S.2d 713 (1985), is the most thorough analysis of a state's obligation under the full faith and credit clause to recognize other states' restrictions on their criminal judgments. In *Farmland*, a New Jersey corporation had been convicted of price rigging in New Jersey while an application to extend its license was pending in New York. The New Jersey judgment of conviction contained the limitation that the guilty plea could not be used as evidence in any civil proceeding. In the subsequent New York hearing on whether Farmland's extension application for its New York license should be denied, a certified copy of the New Jersey conviction was received in evidence. The agency denied an extension of the New York license. The New York Court of Appeals, relying on settled principles of full faith and credit, held that the New Jersey judgment could be given no more effect in New York than it had in New Jersey. The Court, following federal law, declared:

> Under our Federal structure, each State has its own judicial system capable of adjudicating the rights and responsibilities of the parties brought before it. Given this structure, there is always a risk that two or more States will exercise their power over the same case or controversy with the uncertainty, confusion, and delay that necessarily accompany relitigation of the same issue. The purpose of the full faith and credit clause

> was to avoid such conflicts and weld the independent States into a Nation (*Underwriters Assur. Co. v. North Carolina Life*, 445 U.S. 691, 704; *Sherrer v. Sherrer*, 334 US 343, 355; see generally, Reese and Johnson, The Scope of Full Faith and Credit to Judgments, 49 Colum L Rev 153). . . . The doctrine establishes a rule of evidence, however, which requires recognition of the foreign judgment as proof of the prior out-of-State litigation and gives it res judicata effect, thus avoiding relitigation of issues in one State which have already been decided in another (see, *Parker v. Hoefer*, 2 NY2d 612, *cert denied*, 355 US 833; *Durfee v. Duke*, 375 US 106; *Magnolia Petroleum Co. v. Hunt*, 320 US 430, 438; *Riley v. New York Trust Co.*, *supra*).

65 N.Y.2d at 55, 478 N.E.2d at 1316-17, 489 N.Y.S.2d at 715-16. In accordance with this theory, the New York courts have not only recognized and followed other states' post-conviction vacaturs[9] (*People v. Willis*, 79 A.D.2d 1036, 435 N.Y.S.2d 38 (2d Dep't 1981)), but have also followed another state's conclusion that a defendant should be treated as a youthful offender. *People v. Carpenteur*, 21 N.Y.2d 571, 236 N.E.2d 850, 289 N.Y.S.2d 615 (1968).[10] New York urges this Court to adopt the interpretation of the full faith and credit clause set forth in *Farmland Dairies*.

The full faith and credit clause precludes a state from questioning the logic or validity of a judgment rendered by a sister state. *Milliken v. Meyer*, 311 U.S. 457, 462 (1941). The Mississippi

[9] Mississippi announced that it will set aside a conviction under an habitual criminal statute if the predicate conviction is subsequently vacated by another state. *Phillips v. State*, 421 So. 2d 476 (Miss. 1982). However, Mississippi now refuses to follow this rule in the instant capital case.

[10] New York also allows a defendant to challenge the use of a prior conviction to enhance sentences on subsequent felonies. *People v. Wilkins*, 28 N.Y.2d 213, 269 N.E.2d 803, 321 N.Y.S.2d 87 (1971); N.Y. Crim. Proc. Law § 400.20 (McKinney 1983). A successful challenge either in New York or in a sister state will result in a reduced sentence in New York.

Supreme Court violated this constitutional prohibition and in doing so made serious errors about New York law. Mississippi attempts to justify its continued recognition of the 1963 conviction while ignoring the 1987 vacatur by relying on various irrelevant facts. Among the reasons cited by the Mississippi court are its mistaken belief that the New York reversal was on collateral attack rather than on direct appeal, Mr. Johnson's having served his sentence on the 1963 conviction, and the twenty year lapse between the conviction and the reversal by the New York Court of Appeals. Mississippi further violates the *Milliken* rule by attacking the integrity of the New York prosecutor for having "no significant interest or concern in vouchsafing the validity of [Mr. Johnson's] 1963 conviction." *Johnson v. State*, 511 So. 2d at 1338. None of these allegations, even if true, would justify Mississippi's refusal to follow New York's judgment vacating the 1963 conviction.

The Mississippi Supreme Court's fundamental confusion about the New York law under which the 1963 conviction was vacated is revealed when it stated:

> [I]n this case, we do not address whether a prior conviction can be used as an aggravating circumstance if that conviction is subsequently reversed on direct appeal. We do hold that a foreign state cannot vitiate the death penalty verdict in this state by setting aside a prior conviction of a violent crime through a collateral relief petition.

Johnson v. State, 511 So. 2d at 1338.

The Mississippi court failed to understand that the New York Court of Appeals acted on a direct appeal. Under New York law, the right to appeal is so important that under some circumstances, appeals will be allowed notwithstanding long lapses of time. *People v. Montgomery*, 24 N.Y.2d 130, 247 N.E.2d 130, 299 N.Y.S.2d 156 (1969). Recognizing the importance of a defendant's right to appeal, the New York Legislature codified *Montgomery* in 1971. N.Y. Crim. Proc. Law § 460.30 (McKinney 1983); see also Bellacosa, Practice Commentary, McKinney's Consolidated Laws of N.Y. Crim. Proc. Law § 460.30 at 34.

Although this section includes a one-year extension of time in which to take an appeal, the Court of Appeals has held that it does not impose an absolute bar to appeals taken beyond the one year extension, especially where a defendant has made efforts to take a timely appeal. *People v. Johnson*, 69 N.Y.2d 339, 506 N.E.2d 1177, 514 N.Y.S.2d 324 (1986); *People v. Thomas*, 47 N.Y.2d 37, 389 N.E.2d 1094, 416 N.Y.S.2d 573 (1979). Thus, here, where Johnson made persistent efforts to appeal his conviction and appointed counsel and court personnel failed to assist him to perfect in a timely manner, the New York Court of Appeals' reversal of Johnson's conviction is consistent with well settled law in this state.

The New York Court of Appeals has fashioned different relief according to the facts of each case in which an appeal was not timely filed or perfected. In *People v. Montgomery*, 24 N.Y.2d 130, 247 N.E.2d 150, 299 N.Y.S.2d 156 (1969), and *People v. Rivera*, 39 N.Y.2d 519, 349 N.E.2d 825, 384 N.Y.S.2d 726 (1976), the Court of Appeals held that where a defendant's right to appeal had been dissipated by a court-appointed attorney's failure to file or prosecute an appeal or where the defendant had not been advised of his right to appeal, the defendant was entitled to resentencing *nunc pro tunc* so that the time for appeal would run anew. *Montgomery*, 24 N.Y.2d at 134, 274 N.E.2d at 133, 299 N.Y.S.2d at 161; *Rivera*, 39 N.Y.2d at 349 N.E.2d at 826-27, 384 N.Y.S.2d at 727.

Johnson's case was decided in accordance with *Montgomery* and *Rivera*. In *Rivera*, the Court of Appeals reversed a 23-year old conviction for reasons strikingly similar to those in this case. The defendant had not been advised of his right to appeal at sentencing in 1953, and was resentenced *nunc pro tunc* in 1973. However, after resentencing, he could not appeal because no record of his trial existed and the trial transcript was unavailable. The case was therefore remitted for a new trial.

Johnson made a motion pursuant to N.Y. Crim. Proc. Law § 440.10 (McKinney 1983)[11] to vacate his conviction in Monroe

[11] Section 440.10, entitled Motion to Vacate Judgment, states in pertinent part:
(footnote continued)

County on July 30, 1986, in accordance with the procedure set forth in *Montgomery*. His primary claim was that the conviction was invalid because he was not told of his right to appeal when he was sentenced.[12] On October 29, 1986, the Monroe County court granted the motion to the extent that it ordered that Johnson be resentenced to permit him to take a direct appeal from his 1963 conviction. From that point the New York procedures were pursuant to direct appeal, not coram nobis. *People v. Johnson*, Index 32/36 (County Court, Monroe Ct. Oct. 29, 1986). Resentencing under these circumstances necessarily raised for review the conviction from which the appeal was taken. *See People v. Callaway*, 24 N.Y.2d 127, 247 N.E.2d 127, 299 N.Y.S.2d 154 (1969); *People v. Hairston*, 10 N.Y.2d 92, 176 N.E.2d 90, 217 N.Y.S.2d 77 (1961).

The relief granted to Johnson by the New York Court of Appeals was the only appropriate remedy under the circumstances. In Johnson's case, as in *Rivera*, the trial transcript is unavailable, witnesses are deceased, trial counsel is unavailable, and the complainant cannot be found. However, unlike in *Rivera*, Johnson was able to raise the existence of appealable issues in his first trial – specifically whether his confession was obtained by coercion and subsequently illegally introduced as evidence.[13] The

1. *At any time* after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that: . . .

   (h) The judgment was obtained in violation of a right of the defendant under the constitution of this state or of the United States.

Id. (emphasis supplied).

[12] Besides claiming that he had been unconstitutionally denied his right to appeal, Johnson's 1986 motion pursuant to section 440.10 included two other claims: that no hearing was held on the voluntariness of his confession, and that the alleged confession resulted from post-indictment interrogation without the presence of counsel. *People v. Johnson*, 125 A.D.2d 1008, 509 N.Y.S.2d 789 (4th Dep't 1986).

[13] In *People v. Huntley*, 15 N.Y.2d 72, 204 N.E.2d 179, 255 N.Y.S.2d 838 (1965), the New York Court of Appeals adopted procedures for hearings on voluntariness of confessions to be received against a defendant at trial in accordance with the constitutional requirements this Court announced in *Jackson v. Denno*, 378 U.S. 368 (1964). *Huntley* is applied retroactively, but here where no hearing could be conducted in 1986, the Court of Appeals dismissed the indictment.

proper remedy in *Johnson* was vacatur and dismissal of the indictment, while in *Rivera*, where no appealable issues were demonstrated, a new trial was properly ordered.

Thus, the Mississippi Supreme Court misinterpreted New York law by deeming Johnson's 1986 attack on his New York conviction as collateral. While his petition was initially so styled, once the request for resentencing was granted, the case proceeded as a direct appeal of a criminal conviction.[14]

The Mississippi Supreme Court has recognized Johnson's 1963 conviction but not the 1986 vacatur because of a mistaken view of finality:

> If his crime was serious enough for him to have been convicted and final enough for him to serve time in a penal institution, it had sufficient finality to be considered as an aggravating circumstance by a jury of this state. No death penalty verdict based upon this conviction can be vitiated by the subsequent relief granted more than twenty years later by the New York Court of Appeals.

Johnson v. State, 511 So. 2d at 1339. As this Court has recognized, under the full faith and credit clause the judgment of another state must be given "the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984). Here, the 1963 New York judgment

[14] Under New York law, a vacatur on a collateral attack is equivalent to one on a direct appeal. While Johnson's appeal began procedurally as a coram nobis petition, the ultimate ruling was on a direct appeal. The question, however, of what procedure was used to obtain the vacatur is a distinction without legal significance under New York law. Contrary to what the Mississippi court has suggested, a conviction which has been vacated pursuant to a petition under N.Y. Crim. Proc. Law § 440.10 (McKinney 1983) is as much a nullity as one vacated pursuant to a direct appeal. *People v. Cooks*, 67 N.Y.2d 100, 491 N.E.2d 676, 500 N.Y.S.2d 503 (1986); *Burrell v. McMann*, 51 Misc. 2d 185 (N.Y. Sup. Ct. 1966); N.Y. Crim. Proc. Law § 440.10 (McKinney 1983). Furthermore, a collateral attack on an issue such as newly discovered evidence undermines confidence in the outcome of the trial as readily as issues raised on direct appeal based on the trial record.

was vacated and has no effect. It is well-settled that "[a] vacated judgment has no preclusive force either as a matter of collateral or direct estoppel or as a matter of law of the case." *No East-West Highway Committee, Inc. v. Chandler*, 767 F.2d 21, 24 (1st Cir. 1985) (citing *DeNato v. Finch*, 436 F.2d 737, 740 (3d Cir. 1971)); 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4432 at 302 (1981).

For Mississippi to base a sentence of death upon a judgment that has been set aside is contrary to the prevailing law. *See, e.g., Butler v. Eaton*, 141 U.S. 240, 244-45 (1891) ("The judgment complained of is based directly on the judgment of the supreme judicial court of Massachusetts, which we have just reversed. It is apparent from an inspection of the record that the whole foundation of that part of the judgment which is in favor of the defendant is, to our judicial knowledge, without any validity, force, or effect, and ought never to have existed."); Fed. R. Civ. P. 60(b)(5) ("On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: . . . a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application."); Restatement (Second) of Judgments § 16 and comment c (1982) ("[A] party, upon a showing that the earlier judgment has been nullified and that relief from the later judgment is warranted, may by appropriate proceedings secure such relief.").

The Mississippi Supreme Court also erred in relying on the 1963 conviction, because Johnson had been denied the right to a direct appeal of that judgment. The Court of Appeals for the Second Circuit has held that facts found at a criminal trial cannot be used against the convicted defendant in a later civil action if he has been denied the right to an appeal. *Gelb v. Royal Globe Insurance Co.*, 798 F.2d 38 (2d Cir. 1986), *cert. denied*, 107 S.Ct. 1608 (1987). In that case, Gelb had been convicted of arson and mail fraud, served his sentence and his conviction was affirmed on appeal. However, the appellate court expressly refused to decide whether Gelb had set the fire in question. Because Gelb was denied an adjudication on appeal, the Second

Circuit held that Gelb was not collaterally estopped from relitigating the issue whether he had set the fire. The Court stated:

> Appellate review plays a central role in assuring the accuracy of decisions. Thus, although failure to appeal does not prevent preclusion, *see New Haven Inclusion Cases*, 299 U.S. 392, 481, 90 S.Ct. 2054, 2104, 26 L.Ed.2d 691 (1970); *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39, 71 S.Ct. 104, 106, 95 L.Ed. 36 (1950); *Angel v. Bullington*, 330 L.Ed.2d 232 (1947), inability to obtain appellate review, or the lack of such review once an appeal is taken, does prevent preclusion.

798 F.2d at 44. In Johnson's case, because of the fault of the New York courts, there was an "inability to obtain appellate review" of Johnson's 1963 conviction. Thus, if denial of appellate review precludes finality for purposes of a civil law suit, it necessarily precludes finality where the conviction is the basis of a death sentence. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (requiring a "greater degree of reliability when the death sentence is imposed"), *quoted in Zant v. Stephens*, 462 U.S. 862, 888 (1983).

The Mississippi Supreme Court also sought to justify its failure to recognize the New York judgment by attacking the integrity of the New York proceedings[15] as well as the conduct of the State's attorney. The Mississippi court wrote:

> [T]here is no evidence or indication that the post-conviction relief proceedings in the New York courts were truly adversarial . . . the state's attorney in New York had no significant interest or concern in vouchsafing the validity of his 1963 conviction, and we find no challenge by the state's attorney of New York of Johnson's petition.

[15] As the Supreme Court of Pennsylvania has stated, "the structure of our federal system suggests that we should assume that steps taken by a sister state to protect rights are accurate and in good faith." *Commonwealth ex rel. Marshall v. Gedney*, 478 Pa. 299, 386 A.2d 942, 948 (1978).

Johnson v. State, 511 So. 2d at 1338. As this Court has recognized, even after a conviction, a prosecutor is "bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction." *Imbler v. Pachtman*, 424 U.S. 409, 427 n.25 (1976). The New York prosecutor comported with these standards in conducting an independent investigation of the case and informing the courts of his findings.

The New York courts have consistently demonstrated that, under article IV, § 1 of the United States Constitution, they grant full faith and credit to other states' vacaturs of criminal convictions as well as other states' restrictions in their criminal judgments. Mississippi, however, has violated its obligation to recognize New York's vacatur of Johnson's 1963 conviction. Therefore, the matter should be remanded for a resentencing.

CONCLUSION

The sentence of death should be vacated and the matter remanded for a resentencing at which Mississippi is precluded from relying on Mr. Johnson's vacated 1963 New York conviction.

Dated: New York, New York
February 25, 1988

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the State of New York
120 Broadway
New York, New York 10271
(212) 341-2018

O. PETER SHERWOOD
Solicitor General

SUZANNE M. LYNN
SUSAN JACOBS
BARRY BASSIS
Assistant Attorneys General
Of Counsel

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

No. 87-5468

SAMUEL BICE JOHNSON,
Petitioner,

vs.

THE STATE OF MISSISSIPPI,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Association of the Bar of the City of New York ("Association") hereby respectfully moves for leave to file the annexed brief *amicus curiae* in support of Petitioner Samuel Bice Johnson, as provided in Rule 36 of the Rules of this Court. The consent of the attorneys for Petitioner has been obtained. The consent of the State of Mississippi was requested, but refused.

The Association, presently comprised of more than 17,000 lawyers admitted to practice in the State of New York, has since its organization in 1871 developed nationally recognized expertise in its fields of interest, and a long-standing commitment to improvement of the criminal justice system. The Association has particular expertise in New York law and procedure.

Because the judgment that Respondent refused to credit was a finding by New York's highest court that Petitioner's conviction, used as an aggravating circumstance to support the death sentence, was a nullity under New York law, the Association believes it can bring a uniquely well-informed viewpoint to this case.

Petitioner will necessarily concentrate on the capital law issues presented in this case. It is the view of the Association, however, that the judgment below threatens an entire body of jurisprudence outside the death penalty area. Specifically, the Association is concerned that an affirmance would upset a well-settled body of constitutional law in non-capital cases -- squarely grounded in the decisions of this Court -- preventing the use of constitutionally invalid prior convictions in subsequent guilt or sentencing proceedings.

WHEREFORE, the Association respectfully requests that its motion for leave to file the annexed brief *amicus curiae* be granted.

Respectfully submitted,

Robert M. Kaufman, President
THE ASSOCIATION OF THE BAR OF
THE CITY OF NEW YORK
42 West 44th Street
New York, New York 10036-6690
(212) 382-6600

Date: February 25, 1988

TABLE OF CONTENTS

Page

INTEREST OF AMICUS CURIAE 1

STATEMENT OF THE CASE 2
1. The 1963 New York Conviction 3
2. The Vacatur Of The 1963 New York Conviction 5
3. The Mississippi Supreme Court Refuses To Recognize The Vacatur 7

SUMMARY OF ARGUMENT 8

ARGUMENT 9

I. THE MISSISSIPPI SUPREME COURT VIOLATED THE FULL FAITH AND CREDIT CLAUSE IN REFUSING TO RECOGNIZE NEW YORK'S VACATUR OF THE PRIOR NEW YORK CONVICTION USED TO SUPPORT THE DEATH PENALTY 9

A. Mississippi May Not Use The Nullified 1963 Conviction To Enhance Punishment 10

B. Mississippi May Not Impugn The Ruling Of The New York Court of Appeals 12

II. MISSISSIPPI IS REQUIRED TO PERMIT AN ATTACK ON THE CONSTITUTIONALITY OF A CONVICTION USED TO ENHANCE PUNISHMENT AND IS BOUND BY THE OUTCOME OF THE PROCEDURE IT HAS PRESCRIBED FOR SUCH AN ATTACK 15

A. Mississippi Must Accommodate An Attack On The Constitutionality Of A Prior Conviction Offered To Enhance Punishment .. 15

B. Mississippi Is Bound To Give Full Effect To The New York Vacatur 18

CONCLUSION 21

TABLE OF AUTHORITIES

Cases **Page**

Ard v. State, 403 So. 2d 875 (Miss. 1981) 11

Bouie v. Columbia, 378 U.S. 347 (1964) 18

Burgett v. Texas, 389 U.S. 109 (1967) 15, 17

Burrell v. McMann, 51 Misc. 2d 185, 273 N.Y.S.2d 9 (Sup. Ct. 1966) 6

Douglas v. California, 372 U.S. 353 (1963) 14

Estin v. Estin, 334 U.S. 541 (1948) 11

Evitts v. Lucey, 469 U.S. 387 (1985) 14

Griffin v. Griffin, 327 U.S. 220 (1946) 12

Hampton v. M'Connel, 16 U.S. (3 Wheat.) 234 (1818) 9

Huntington v. Attrill, 146 U.S. 657 (1892) 10

In re Grube's Will, 162 Misc. 267, 294 N.Y.S. 311 (Sur. Ct. 1937) 6

Jackson v. Denno, 378 U.S. 368 (1964) 17

Johnson v. Muelberger, 340 U.S. 581 (1951) 9

Johnson v. State, 477 So. 2d 196 (Miss.1985), *cert. denied*, 476 U.S. 1109, *reh. denied*, 106 S. Ct. 2930 (1986) 7

Johnson v. State, 511 So. 2d 1333 (Miss. 1987), *cert. granted*, 98 L. Ed. 2d 646, 56 U.S.L.W. 3459 (U.S. Jan. 11, 1988) 2, 7, 8, 12, 19

Cases **Page**

Kelley v. United States, 487 F.2d 898 (6th Cir. 1973) 16, 17

Kremer v. Chemical Constr. Corp., 456 U.S. 461 (1982) 19

Lipscomb v. Clark, 468 F.2d 1321 (5th Cir. 1972) 16, 17

Milwaukee County v. M.E. White Co., 296 U.S. 268 (1935) 10, 16, 17

Mississippi State Bar v. Phillips, 385 So. 2d 943 (Miss. 1980) 10, 11

Mullins v. Lane, 484 F. Supp. 237 (E.D. Tenn. 1979) 17

Murgia v. United States, 448 F.2d 1275 (9th Cir. 1971) 16

People v. Johnson, 69 N.Y.2d 339, 506 N.E.2d 1177, 514 N.Y.S.2d 324 (1987) 3, 4, 5, 6

People v. Johnson, 125 A.D.2d 1008, 509 N.Y.S.2d 789 (App. Div. 1986) 5, 6, 13

People v. Johnson, No. 32/63, slip op. (Monroe County Ct. Oct. 29, 1986) 13

People v. Jordan, 33 A.D.2d 1077, 307 N.Y.S.2d 707 (App. Div. 1970) 3, 14

People v. Lucci, 27 N.Y.2d 550, 261 N.E.2d 263, 313 N.Y.S.2d 121 (1970) 3

People ex rel. Metz v. Lavalee, 56 Misc. 2d 841, 290 N.Y.S.2d 465 (Sup. Ct. 1968) 6

People v. Montgomery, 24 N.Y.2d 130, 247 N.E.2d 130, 299 N.Y.S.2d 156 (1969) 3, 5, 13, 14

Cases **Page**

People v. Ramos, 30 A.D.2d 848, 292 N.Y.S.2d 938 (App. Div. 1968) 14

People v. Rivera, 39 N.Y.2d 519, 349 N.E.2d 825, 384 N.Y.S.2d 726 (1976) 13, 14

People v. Spencer, 61 Misc. 2d 399, 305 N.Y.S.2d 906 (Sup. Ct. 1969), *aff'd*, 37 A.D.2d 920, 326 N.Y.S.2d 981 (App. Div. 1971) 14

Phillips v. State, 421 So. 2d 476 (Miss. 1982) 5, 7, 17, 18

Puerto Rico v. Branstad, 107 S. Ct. 2802 (1987) 10

Reeves v. Mabry, 615 F.2d 489 (8th Cir. 1980) 16

Sherrer v. Sherrer, 334 U.S. 343 (1948) 13

The Antelope, 23 U.S. (10 Wheat.) 66 (1825) 10

Townsend v. Burke, 334 U.S. 736 (1948) 17

Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guaranty Ass'n, 455 U.S. 691 (1982) 9

United States v. Dorman, 496 F.2d 438 (4th Cir.), *cert. denied*, 419 U.S. 945 (1974) 16

United States v. Martinez, 413 F.2d 61 (7th Cir. 1969) 16

United States ex rel. Savini v. Jackson, 250 F.2d 349 (2d Cir. 1957) 16, 17

United States ex rel. Easterling v. Wilkins, 303 F.2d 883 (2d Cir. 1962) 16

United States v. Tucker, 404 U.S. 443 (1972) 15, 17

Cases **Page**

Usry v. State, 378 So. 2d 635 (Miss. 1979) 11

Watson v. State, 291 So. 2d 741 (Miss. 1974). 11

Wheat v. Thigpen, 793 F.2d 621 (5th Cir. 1986), *cert. denied*, 107 S. Ct. 1566 (1987) 18

Williams v. North Carolina, 317 U.S. 287 (1942) 10

Wisconsin v. Pelican Ins. Co., 127 U.S. 265 (1888) 10

Constitutional Provisions and Statutes

United States Constitution Article 4, section 1 ..... *passim*

United States Constitution Fifth Amendment 17

United States Constitution Sixth Amendment 17

Miss. Code Ann. § 99-39-1 *et seq.* (Supp. 1987) 7

Miss. Code Ann. § 99-19-81 (Supp. 1987) 11

Miss. Code Ann. § 99-19-101 (Supp. 1987) 2

N.Y. Code Crim. Proc. Law § 517 (McKinney 1962) (now codified at N.Y. Crim. Proc. Law § 450.10 (McKinney 1983 & Supp. 1988)) 3

N.Y. Code Crim. Proc. Law § 521 (McKinney 1962) (now codified at N.Y. Crim. Proc. Law § 460.10 (McKinney 1983 & Supp. 1988)) 3

N.Y. Crim. Proc. Law § 450.10 (McKinney 1983 & Supp. 1988) 13

N.Y. Penal Law § 243 (McKinney 1962) (now codified at N.Y. Penal Law § 120.05 (McKinney 1980 & Supp. 1988)) 3

Articles

Note, *The United States and the Articles of Confederation*, 88 Yale L.J. 142 (1978) 9

Miscellaneous

Affidavit of Melvin Bressler 5, 13

Affidavit of Edward J. Nowak 4, 6, 17

Brief of the Attorney General of the State of New York, as *Amicus Curiae* in Support of Petitioner [in seeking Writ of Certionari] 20

Brief of Petitioner 15

Joint Appendix 4, 6, 17

No. 87-5468

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

SAMUEL BICE JOHNSON,
Petitioner,

vs.

THE STATE OF MISSISSIPPI,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF MISSISSIPPI

BRIEF OF THE COMMITTEE ON CIVIL RIGHTS OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, AS AMICUS CURIAE IN SUPPORT OF PETITIONER

The Committee on Civil Rights of The Association of the Bar of the City of New York (the "Association") respectfully submits this brief on behalf of the Association as *amicus curiae* in support of Petitioner.

INTEREST OF AMICUS CURIAE

The Association is an organization of over 17,000 attorneys with nationally recognized expertise in its fields of interest and a long-standing commitment to improvement of the criminal justice system. The Association has been active in this area through *amicus* briefs to this and other courts, testimony before legislative bodies, and the publication of committee reports.

The Association has particular expertise in New York law and procedure. Because the judgment that the Mississippi Supreme Court refused to credit was a finding by New York's highest court that Petitioner's conviction, used as an aggravating circumstance to support the death sentence, was a nullity under New York law, the Association brings a uniquely well-informed viewpoint to this case.

Moreover, although the parties have not emphasized the issue, the judgment below threatens an entire body of jurisprudence outside the death penalty area (*see* Point II, *infra*). Accordingly, the Association believes it can be particularly useful in assisting the Court to place this case into proper perspective.

STATEMENT OF THE CASE

Petitioner Samuel Bice Johnson was convicted of murder in Mississippi in 1982. In successfully seeking imposition of the death penalty, the State of Mississippi presented to the jury three aggravating circumstances; the one relied on most heavily by the prosecution was Johnson's 1963 second-degree assault conviction in New York. 1/

1/ The conviction was offered as an aggravating circumstance pursuant to Miss. Code Ann. § 99-19-101(5)(b) (Supp. 1987). The prosecutor also offered two other aggravating circumstances, claiming that the capital offense was committed for the purpose of fleeing arrest, *id.* § 5(e), and that the capital offense was "especially heinous, atrocious or cruel," *id.* § 5(h).

The Mississippi Supreme Court conceded that because of the extensive use of the New York conviction by the prosecutor in his argument to the sentencing jury, any infirmity in this aggravating circumstance could not be viewed as harmless error. *Johnson v. State*, 511 So. 2d 1333, 1338 (Miss. 1987), *cert. granted*, 56 U.S.L.W. 3459 (U.S. Jan. 11, 1988).

1. The 1963 New York Conviction.

In 1963, when he was 21 years old, Johnson was convicted of assault in the second degree in Monroe County, New York. *See* N.Y. Penal Law § 243 (McKinney 1962) (now codified at N.Y. Penal Law § 120.05 (McKinney 1980 & Supp. 1987)). Sentenced to a prison term of 1-1/2 to 3 years, he served one year before being paroled for good behavior.

Under then-existing New York law, Johnson had a right to appeal upon the judgment of conviction. N.Y. Code Crim. Proc. Law § 517 (McKinney 1962) (now codified at N.Y. Crim. Proc. Law § 450.10 (McKinney 1983 & Supp. 1988)). Johnson was not advised by either his court-appointed lawyer, the prosecutor, or the court of his right to appeal. *People v. Johnson*, 69 N.Y.2d 339, 341, 506 N.E.2d 1177, 1178, 514 N.Y.S.2d 324, 325 (1987) (per curiam). Under New York law, this failure violated Johnson's constitutional rights as enunciated in *People v. Montgomery*, 24 N.Y.2d 130, 247 N.E.2d 130, 299 N.Y.S.2d 156 (1969). 2/

Johnson did not discover that he had the right to appeal until the period for initiating an appeal had lapsed. 3/ He then repeatedly petitioned for permission to do so. *People v. John-*

2/ New York courts have applied *Montgomery* retroactively. *See, e.g., People v. Lucci*, 27 N.Y.2d 550, 261 N.E.2d 263, 313 N.Y.S.2d 121 (1970); *People v. Jordan*, 33 A.D.2d 1077, 307 N.Y.S.2d 707 (App. Div. 1970).

3/ Under the New York procedure in effect at the time of Johnson's conviction, Johnson would have had to file a notice of appeal within 30 days of the imposition of his sentence. N.Y. Code Crim. Proc. Law § 521 (McKinney 1962) (now codified at N.Y. Crim. Proc. Law § 460.10 (McKinney 1983 & Supp. 1988)).

son, 69 N.Y.2d at 341, 506 N.E.2d at 1178, 299 N.Y.S.2d at 325. In 1967 he filed a *pro se* notice of appeal. (JA. 125) [4] This notice was dismissed by a court clerk in Monroe County who deemed the notice "untimely," not knowing that Johnson had not initially been advised of his right to appeal. *Id.*

Over the next four years, Johnson filed two *pro se* petitions alleging a denial of his right to appeal. *Id.* These applications were denied. When Johnson filed a notice of appeal from one of these denials, the Monroe County public defender's office was appointed to represent him. That office, which was experiencing severe lapses in performance, [5] never perfected the appeal. Thus, when used by Mississippi as an aggravating circumstance in the sentencing phase of Johnson's trial, the 1963 conviction was the unappealed judgment of a trial court.

Questions about the validity of the 1963 conviction could not have been entertained by the Mississippi trial court during the sentencing phase, however. Under Mississippi law, when a prior conviction in another state is utilized to enhance a sentence for a later crime, a defendant who wishes to challenge the predicate conviction is required to do so in the courts of the other state and only then, if successful, mount a collateral attack on the enhanced sentence in Mississippi:

4/ "JA. ____" references are to pages in the Joint Appendix.

5/ Affidavit of Edward J. Nowak ¶ 2 (appended to Brief of the Attorney General of the State of New York, as *Amicus Curiae* in Support of Petitioner [in seeking Writ of Certiorari] [hereinafter "Attorney General Certiorari Brief"]).

> [A]ny such proceeding should be brought in the state in which such conviction occurred, pursuant to that state's established procedures. Should such proceeding in the foreign state succeed in overturning the conviction, then relief should be sought in Mississippi by petition for writ of error coram nobis. *Phillips v. State*, 421 So. 2d 476, 482 (Miss. 1982).

2. The Vacatur Of The 1963 New York Conviction.

Following the dictates of *Phillips v. State*, Johnson, now represented by current counsel, attacked his 1963 conviction in a further proceeding in the New York courts in 1986. Upon review of its records, the Monroe County district attorney admitted the State's earlier failure to advise Johnson of his right to appeal. *See* Affidavit of Melvin Bressler ¶ 6 (appended to Attorney General Certiorari Brief). However, the State of New York argued in three New York courts that this failure did not entitle Johnson to any relief other than resentencing. *Id.* at ¶¶ 6-8, 11-12.

Although both the Monroe County court and the intermediate appellate court agreed with the State of New York's contention that Johnson was not entitled to the relief he sought, [6] Johnson prevailed in the New York Court of Appeals, which vacated his assault conviction and dismissed the underlying indictment. *People v. Johnson*, 69 N.Y.2d 339, 506 N.E.2d 1177, 514 N.Y.S.2d 324 (1987) (per curiam). Relying on *Montgomery, supra*, New York's highest court held that Johnson had been denied his constitutional right to appeal:

6/ The opinion of the County Court for Monroe County, which resentenced Johnson but otherwise denied relief, is unreported. (A copy has been lodged with this Court.) The opinion of the Appellate Division, which denied Johnson's motion to review his 1963 conviction, is reported at *People v. Johnson*, 125 A.D.2d 1008, 509 N.Y.S.2d 789 (App. Div. 1986).

> It is undisputed that defendant was never advised of his right to appeal from the assault conviction and that, upon discovering that right, he made several timely and diligent *pro se* attempts to obtain review of the judgment through the avenues available to him at the time. Further, it is undisputed that the actions of this State prevented defendant from ever obtaining the review of the conviction to which he was entitled. 69 N.Y.2d at 341, 506 N.E.2d at 1178, 514 N.Y.S.2d at 325.

The court concluded that the interests of justice would not be served by a new trial since "the records of defendant's trial have been lost, . . . neither reconstruction nor a new trial is possible and . . . defendant has raised appealable issues with possible merit." *Id.* at 342, 506 N.E.2d at 1178, 514 N.Y.S.2d at 325.

The court's conclusion was bolstered by the fact that Johnson was prepared to present several significant constitutional challenges to his 1963 conviction. Chief among these were allegations that a confession used to convict him had been elicited involuntarily and without the presence of counsel, and that there had been no hearing to determine the voluntariness of the confession. (JA. 89-90, 137-39); *see also* Affidavit of Edward J. Nowak ¶ 4 (appended to Attorney General Certiorari Brief).

As a result of the Court of Appeals' ruling, the 1963 conviction was nullified -- i.e., under New York law, it was rendered void *ab initio*. *Burrell v. McMann*, 51 Misc. 2d 185, 188, 273 N.Y.S.2d 9, 12 (Sup. Ct. 1966) (by vacating judgment of conviction, "court declared that all proceedings relating thereto were a nullity"); *cf. People ex rel. Metz v. Lavalee*, 56 Misc. 2d 841, 290 N.Y.S.2d 465 (Sup. Ct. 1968); *In re Grube's Will*, 162 Misc. 267, 294 N.Y.S. 311 (Sur. 1937).

3. The Mississippi Supreme Court
Refuses To Recognize The Vacatur.

Prior to 1987, Johnson's various appeals in the Mississippi courts of his 1982 murder conviction and death sentence were unsuccessful. [7/] In light of his successful attack on the 1963 conviction in New York, Johnson amended his petition for post-conviction relief in Mississippi to reflect the New York Court of Appeals decision vacating his 1963 conviction and dismissing the indictment.

Although Johnson had done just what the Mississippi Supreme Court had prescribed in *Phillips*, on May 27, 1987 the Mississippi Supreme Court refused to recognize New York's vacatur of the 1963 conviction and held that Johnson was not entitled to resentencing. *Johnson v. State*, 511 So. 2d 1333, 1339 (Miss. 1987), *cert. granted*, 96 L. Ed. 2d 646, 56 U.S.L.W. 3459 (U.S. Jan. 11, 1988). [8/] The court held that "a foreign state cannot vitiate the death penalty verdict in this state by setting aside a prior conviction of a violent crime through a collateral relief petition." *Id.* at 1338. Further, the Mississippi Supreme Court impugned the New York proceed-

---

[7/] Johnson's conviction and sentence were affirmed on direct appeal by the Mississippi Supreme Court. *Johnson v. State*, 477 So. 2d 196 (Miss. 1985). His petition to this Court for a writ of certiorari was denied, *Johnson v. Mississippi*, 476 U.S. 1109 (1986) (Brennan and Marshall, J.J., dissenting), as was his petition for rehearing, *Johnson v. Mississippi*, 106 S. Ct. 2930 (1986). On August 4, 1986, Johnson filed a motion for post-conviction relief under the Mississippi Uniform Post-Conviction Relief Act, Miss. Code Ann. § 99-39-1 *et seq.* (Supp. 1986). That same day, the Mississippi Supreme Court granted a stay of execution (then scheduled for August 6, 1986).

[8/] The Mississippi Supreme Court denied petitioner's request for rehearing on July 15, 1987. *Johnson v. State*, DP No. 43, slip op. (Miss. July 15, 1987).

ings as not "truly adversarial" because the State's attorney had "no significant interest or concern in vouchsafing the validity of [Johnson's] 1963 conviction. . . ." *Id.*

In a dissenting opinion joined by two justices, Justice Robertson criticized the majority for "tak[ing] a swipe at the New York action [in] suggesting that the Court of Appeals' March 24, 1987, order should be given less than full faith and credit." *Id.* at 1343 (Robertson, J., dissenting). The dissenting opinion concluded that "vitiation of Johnson's 1963 New York conviction undermines confidence in the outcome of the penalty phase of his capital murder trial." *Id.* at 1345.

SUMMARY OF ARGUMENT

The State of Mississippi relied on the full faith and credit clause when, in presenting a New York conviction as an aggravating circumstance in a capital sentencing proceeding, it assigned complete effect to the New York judgment. Mississippi's adamant refusal to allot corresponding recognition to its sister state's subsequent vacatur of that conviction clearly violates the full faith and credit clause.

Apart from the full faith and credit clause, it is settled that the Constitution requires a defendant subject to enhanced sentencing based on a prior conviction to be given the opportunity to challenge the validity of that conviction. By requiring a defendant to make such a challenge in the foreign state rather than hearing the claims in its own courts, Mississippi affirmatively assumes the obligation of giving effect to the resulting foreign court ruling. Thus, when New York vacated the predicate conviction, Mississippi, having deflected that examination to a sister state, was required to give full effect to that state's vacatur and undo the proceedings concededly based substantially upon it.

ARGUMENT

I.

THE MISSISSIPPI SUPREME COURT VIOLATED THE FULL FAITH AND CREDIT CLAUSE IN REFUSING TO RECOGNIZE NEW YORK'S VACATUR OF THE PRIOR NEW YORK CONVICTION USED TO SUPPORT THE DEATH PENALTY

Article IV, section 1 of the Constitution provides that "Full Faith and Credit shall be given in each State to the public Acts, Records and Judicial Proceedings of every other State." This Court has mandated that "the judgment of a state court should have the same credit, validity, *and effect*, in every other court of the United States, which it had in the state where it was pronounced." *Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guaranty Ass'n*, 455 U.S. 691, 704 (1982) (courts of North Carolina required to recognize judgment of Indiana court) (emphasis added) (quoting *Hampton v. M'Connel*, 16 U.S. (3 Wheat.) 234, 235 (1818) (Marshall, C.J.)); *see also Johnson v. Muelberger*, 340 U.S. 581 (1951).

The principle that judicial comity is fundamental in a nation molded from many diverse states has been recognized since the inception of our federal system. Even under the Articles of Confederation, state courts were required to give full effect to the judgments of sister states. *See* Note, *The United States and the Articles of Confederation*, 88 Yale L.J. 142, 159–60, 162 n. 37 (1978) (discussion of similar comity clause in Constitution's forerunner; comparison of texts).

The importance of this clause to the integrity of our federal system of justice is manifest:

> The very purpose of the full faith and credit clause was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin. *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 276–77 (1935).

A. Mississippi May Not Use The Nullified 1963 Conviction To Enhance Punishment.

The full faith and credit clause requires that a state recognize criminal judgments rendered in a sister state in the same way it would if they were rendered in its own courts. *See Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 291–92 (1888). 9/ Thus, Mississippi is itself granting full faith and credit to foreign convictions when it introduces them to support enhanced sentencing under its habitual felony statute. Miss. Code. Ann. § 99-19-81 (Supp. 1987) (deeming as predicate convictions in habitual criminal sentencing convictions rendered "in this state *or elsewhere*") (emphasis added); *see also Watson v. State*, 291 So. 2d 741, 743 (Miss. 1974) (previous conviction under law of Mississippi or another state may be used to enhance punishment); *Ard v. State*, 403 So. 2d 875, 876 (Miss. 1981); *Usry v. State*, 378 So. 2d 635, 637 (Miss. 1979). Specifically, Mississippi relied upon the full faith and credit clause when it presented Johnson's 1963 New York conviction to the jury as an aggravating circumstance justifying the death penalty in this case. It asked the jury to accept that conviction as a valid judgment, as if it had been rendered by a Mississippi court.

When New York's highest court invalidated the 1963 judgment, however, Mississippi refused to give that decision any effect at all. This it could not constitutionally do. "The Full Faith and Credit Clause is not to be applied, accordion-like, to accommodate our personal predilections." *Estin v. Estin*, 334 U.S. 541, 545–46 (1948). Rather, the full faith and credit clause requires that the 1987 New York vacatur be given the same effect in Mississippi as it would be had it been rendered in a Mississippi court. Mississippi would not use a vacated Mississippi conviction to enhance a sentence in its courts. Hence, it may not do so with a vacated foreign conviction.

The decision of the Mississippi Supreme Court in this case runs counter not only to settled principles of federalism but also to principles expressly enunciated in the past by the Mississippi Supreme Court itself. *See Mississippi State Bar v. Phillips*, 385 So. 2d 943, 945 (Miss. 1980) ("We are bound to give full faith and credit to judgments of our sister states and

---

9/ This principle is subject, however, to the so-called "penal exception" to the full faith and credit clause, which provides only that a state is not required to enforce the penal judgment of a foreign state. *See Williams v. North Carolina*, 317 U.S. 287 (1942); *Huntington v. Attrill*, 146 U.S. 657, 668-69 (1892); *cf. The Antelope*, 23 U.S. (10 Wheat.) 66, 122–23 (1825) (it is "almost superfluous to say . . ." that "[t]he courts of no country execute the penal laws of another"). The policy underlying the full faith and credit clause is preserved despite the exception, however. While a state may demur from enforcing a foreign state's penal judgment, it is required to extradite the defendant so that the rendering state may enforce its own conviction. *See Puerto Rico v. Branstad*, 107 S. Ct. 2802 (1987) (if extradition papers facially in order, governor must extradite person sought by sister state; no "public policy" exception).

In any event, the penal exception has no application to this case. Enforcement of the 1963 New York conviction is not at issue here -- indeed, Johnson has already paid the full penalty of incarceration meted out by New York. Mississippi is being asked to give full faith and credit to the New York judgment, not to enforce it.

the federal system, even to the recitation of facts in decisions of their appellate courts.").

In sum, the full faith and credit clause requires Mississippi to consider the 1963 conviction a nullity that cannot support an enhanced sentence on a subsequent criminal conviction.

B. Mississippi May Not Impugn The Ruling Of The New York Court Of Appeals.

Perhaps seeking to buttress its refusal to accept the vacatur, the Mississippi Supreme Court cast aspersions on the proceedings in New York: "We deem it important to add . . . that there is no evidence or indication that the post-conviction relief proceedings in the New York courts were truly adversarial." 511 So. 2d at 1338. In their dissent to that opinion, three justices correctly stated that the majority's characterization was "disingenuous" and a "cynical assumption that the New York Court did less than its duty. . . ." *Id.* at 1343-45 (Robertson, J., dissenting).

Such second-guessing is precisely what the full faith and credit clause forbids. Absent a basis to allege that the vacatur was constitutionally infirm, *see Griffin v. Griffin*, 327 U.S. 220, 228 (1946) (judgment obtained in violation of procedural due process not entitled to full faith and credit in another state), Mississippi was bound to respect New York's judgment, period.

The Mississippi court's reference to the "extreme likelihood" that foreign courts could vacate convictions on which Mississippi relied in adjudging the death penalty, 511 So. 2d at 1338, is not only without foundation in the more than two

centuries of experience under the full faith and credit clause, but is exactly the sort of consideration that the clause is meant to forbid. *Sherrer v. Sherrer*, 334 U.S. 343, 355 (1948) (if in application of full faith and credit clause local policy must give way, such is requirement of federal system).

In any event, the Mississippi Supreme Court's characterization of the proceedings in New York does not comport with the facts.

First, the State of New York vigorously opposed the relief Johnson sought in his writ of coram nobis. *See* Affidavit of Melvin Bressler ¶¶ 8-12 (appended to Attorney General Certiorari Brief). That this was a credible defense is shown by the strength it carried in the Monroe County Court and the Appellate Division, which both sided with the State on the key issue of conviction vacatur. *People v. Johnson*, 125 A.D.2d 1008, 509 N.Y.S.2d 789 (App. Div. 1986); *People v. Johnson*, No. 32/63, slip op. (Monroe County Ct. Oct. 29, 1986). The State's factual concessions regarding the failure to advise Johnson of his right to appeal and the loss of all trial records -- facts clearly undeniable -- cannot possibly be cited to impugn the professional and ethical defense put forth by the State. Mississippi's thinly veiled allegation of collusion between Petitioner and officials of the State of New York is unfounded.

Second, the Court of Appeals' decision was squarely based on regularly-applied principles of New York law. New York provides that every convicted defendant has an absolute and fundamental right to appeal a conviction. N.Y. Crim. Proc. Law § 450.10 (McKinney 1983 & Supp. 1988); *see also People v. Rivera*, 39 N.Y.2d 519, 349 N.E.2d 825, 384 N.Y.S.2d 726 (1976); *People v. Montgomery*, 24 N.Y.2d 130, 247 N.E.2d 130, 299 N.Y.S. 156 (1969). *Montgomery* declared

that the State had an affirmative duty under the Federal Constitution to inform the indigent defendants of this right to appeal. *Id.* at 132, 299 N.Y.S.2d at 159. [10/] This holding was grounded on both due process and equal protection, *id.* at 132, 299 N.Y.S.2d at 159-60, the latter derived from this Court's pronouncement that an indigent defendant cannot be deprived of a vested right to appeal simply because of his poverty. *Douglas v. California*, 373 U.S. 353, 357 (1963); *cf. Evitts v. Lucey*, 469 U.S. 387, 391-400 (1985) (due process guarantees criminal defendant effective assistance of counsel on first appeal as of right). *Douglas* found constitutional error when California failed to provide the benefit of counsel to defendants who were appealing their convictions as of right; in the case at bar, Johnson did not have the opportunity to invoke his right to appeal -- even though there existed serious doubts about the constitutional validity of his alleged confession and his interrogation without counsel.

The courts of New York have for decades granted relief to defendants whose right to appeal was frustrated by the State. *See People v. Rivera*, 39 N.Y.2d 519, 349 N.E.2d 825, 384 N.Y.S.2d 726 (1976); *People v. Jordan*, 33 A.D.2d 1077, 307 N.Y.S.2d 707 (App. Div. 1970); *People v. Ramos*, 30 A.D.2d 848, 292 N.Y.S.2d 938 (App. Div. 1968); *People v. Spencer*, 61 Misc. 2d 399, 305 N.Y.S.2d 906 (Sup. Ct. 1969), *aff'd*, 37 A.D.2d 920, 326 N.Y.S.2d 981 (App. Div. 1971).

10/ As noted above, New York courts have applied *Montgomery* retroactively. *See* note 2, *supra*.

Thus, the New York courts here did no more or no less than they would have done for any other appellant, and the Mississippi Supreme Court attack was not only constitutionally forbidden but factually inaccurate as well.

II.

MISSISSIPPI IS REQUIRED TO PERMIT AN ATTACK ON THE CONSTITUTIONALITY OF A CONVICTION USED TO ENHANCE PUNISHMENT AND IS BOUND BY THE OUTCOME OF THE PROCEDURE IT HAS PRESCRIBED FOR SUCH AN ATTACK

As Petitioner argues in his brief (Brief of Petitioner at Point II), the heightened requirements for accuracy in capital cases command that the constitutionally suspect 1963 conviction not be used as a basis to condemn Johnson to death. But an affirmance in this case will have ramifications that go well beyond the death penalty context. As we show below, affirmance would upset a well-settled body of consitutional law in non-capital cases -- squarely grounded on the decisions of this Court -- preventing the use of invalid prior convictions in subsequent guilt or sentencing proceedings.

A. Mississippi Must Accommodate An Attack On The Constitutionality Of A Prior Conviction Offered To Enhance Punishment.

This Court has made clear that it is unconstitutional for a state to use an invalid conviction to support guilt or enhance punishment. *See, e.g., United States v. Tucker*, 404 U.S. 443, 447 (1972) (use of an invalid prior conviction in sentencing deliberations unconstitutional); *Burgett v. Texas*, 389 U.S. 109, 114-16 (1967) (use of invalid prior conviction to support guilt

or enhance punishment unconstitutional). Lower courts have routinely applied this principle. *See, e.g., Reeves v. Mabry*, 615 F.2d 489, 491 (8th Cir. 1980) (jury assessing punishment under state habitual criminal statute "may not constitutionally enhance punishment by reference to a previous conviction that had been obtained in violation of a constitutional right of the defendant"); *United States v. Dorman*, 496 F.2d 438, 441 (4th Cir.) (invalid convictions cannot be used to enhance a sentence), *cert. denied*, 419 U.S. 945 (1974); *Kelley v. United States*, 487 F.2d 898, 899 (6th Cir. 1973) (per curiam) (same); *Lipscomb v. Clark*, 468 F.2d 1321, 1323 (5th Cir. 1972) (same); *Murgia v. United States*, 448 F.2d 1275, 1276 (9th Cir. 1971) (per curiam) (same); *United States v. Martinez*, 413 F.2d 61, 63 (7th Cir. 1969) (previous conviction tainted by denial of defendant's rights to due process and effective assistance of counsel cannot be used to enhance punishment even if constitutional defect does not appear on the face of the record); *United States ex rel. Easterling v. Wilkins*, 303 F.2d 883, 884 (2d Cir. 1962) (invalid conviction cannot be used in sentencing defendant as multiple offender).

Accordingly, when any prior conviction -- whether from that state or another state (or a federal conviction) -- is offered to enhance punishment, the defendant must be permitted to attack its constitutionality. *See, e.g., United States ex rel. Savini v. Jackson*, 250 F.2d 349, 355 (2d Cir. 1957) ("To the extent that any State makes its penal sanctions depend in part on the fact of prior convictions elsewhere, necessarily *it must assume the burden of meeting attacks on the constitutionality of such prior convictions.*") (emphasis added).

The underlying rationale for this well-settled principle of constitutional law is compelling; to permit a constitutionally infirm conviction to enhance punishment for another offense

is to allow an unconstitutional procedure to injure a defendant twice. *Burgett*, 389 U.S. at 115. In addition, the errors coincident with those constitutional violations render their reliability deeply suspect. *See Townsend v. Burke*, 334 U.S. 736, 741 (1948). Here, for example, the basis for Johnson's principal constitutional challenge to his New York conviction was the denial of counsel at a pre-trial interrogation in which a confession was obtained. (JA. 89-90, 137-39); *see also* Affidavit of Edward J. Nowak ¶ 4 (appended to Attorney General Certiorari Brief). In addition, no hearing was held on the issue of the voluntariness of Johnson's statement, as required by *Jackson v. Denno*, 378 U.S. 368 (1964). This case is a typical example of the sort of constitutional deprivation under the fifth and sixth amendments which has led this and other courts to mandate that an invalid conviction be disregarded for enhancement purposes. *See, e.g., Burgett*, 389 U.S. at 115; *Tucker*, 404 U.S. at 447; *Kelley*, 487 F.2d at 899; *Jackson*, 250 F.2d at 353-54; *Lipscomb v. Clark*, 468 F.2d at 1323, *Mullins v. Lane*, 484 F. Supp. 237, 239 (E.D. Tenn. 1979).

Mississippi has recognized the obligation to permit such challenges to prior convictions, but has chosen to require the defendant to attack a prior foreign state conviction in that foreign state's courts, not in Mississippi. *Phillips v. State*, 421 So. 2d 476, 481-82 (Miss. 1982). Citing the "potential difficulties inherent" in permitting defendants to challenge foreign state convictions in Mississippi courts, (*id.* at 480), the Mississippi Supreme Court requires that

> [any] assault upon the constitutionality of a prior conviction should be conducted in the form of an *entirely separate procedure* solely concerned with attacking that conviction. . . . [A]ny such proceeding should be brought in the state in which such conviction occurred, pursuant to that state's established procedures. *Should such proceeding in the foreign state succeed in*

overturning the conviction, then relief should be sought in Mississippi by petition for writ of error coram nobis." *Id.* at 480–81 (emphasis added).

Thus, to exercise his right to challenge the constitutionality of the prior conviction being offered to the sentencing jury, Johnson was required to initiate an "entirely separate proceeding" in New York. This he did, and he prevailed in the New York Court of Appeals.

B. Mississippi Is Bound To Give Full Effect To The New York Vacatur.

Having set up the procedure in *Phillips* and expressly assumed the risk that a defendant would successfully overturn a prior conviction in a foreign state, Mississippi cannot now renege on this procedure and refuse to recognize the result in the other state's courts. *See Wheat v. Thigpen*, 793 F.2d 621, 624–25 (5th Cir. 1986) (states must follow announced procedural rule or face federal court scrutiny), *cert. denied*, 107 S. Ct. 1566 (1987); *cf. Bouie v. Columbia*, 378 U.S. 347 (1964) (state supreme court, in giving new interpretation of law retroactive effect to detriment of defendants, violates due process). Doing so would violate its original obligation to permit a constitutional attack on the predicate conviction.

Under the procedure mandated by *Phillips*, the criminal trial court acted properly in presuming the 1963 conviction to be valid. Indeed, under *Phillips*, that court could not entertain any challenges to the predicate conviction. But the inescapable corollary to the rule was to prohibit Mississippi from now relying (as it does) on the "sufficient finality" of the 1963 conviction at the time when it was submitted to the jury to support a sentence of death.

Yet the Mississippi Supreme Court did just that:

> The fact remains that Johnson was convicted in 1963 by a New York court . . . for which he was imprisoned in that state. No New York court extended Johnson relief from his conviction before Johnson paid his debt to the state. *If his crime was* serious enough for him to be convicted and *final enough for him to serve time* in a penal institution, *it had sufficient finality to be considered as an aggravating circumstance by a jury of this state*. 511 So. 2d at 1339 (emphasis added).

This "sufficient finality" standard, stated without rationale or authority, would preclude any review of convictions nullified after the defendant has "served time in a penal institution" -- even if subsequent proceedings have cleared him from any criminal guilt.

If Mississippi's argument were accepted, a defendant would seek appeal or vacatur of a prior conviction only as an academic exercise. Once the defendant is convicted and serves his time, Mississippi considers the taint indelible no matter what the effect of the nullification is in the state where the original conviction was rendered. A subsequent appellate or collateral invalidation of the conviction exacts no compromise or reconsideration from Mississippi. [11/] This conflicts with this Court's precedents. *See, e.g., Kremer v. Chemical Constr. Corp.*, 456 U.S.461, 482 (1982) ("A State may not grant preclusive effect in its own courts to a constitutionally infirm judgment, and other state and federal courts are not required to accord full faith and credit to such a judgment.") (footnote omitted).

[11/] The Mississippi Supreme Court hinted that the outcome of the case would be different if the conviction were vacated on "direct appeal." 511 So. 2d at 1338. Any distinction between collateral and

New York's previous unconstitutional action against Johnson had spent its force until Mississippi madeit a legal basis for increased sanctions of its own. Now that New York has recognized and cured its error -- as best it could in the circumstances -- so must Mississippi cure its consequent error.

---

[11]/Continued

direct appeal is irrelevant to the policies underlying the constitutional precepts involved here. Moreover, as fully explicated in the Attorney General Certiorari Brief at 12 n.8, the proceedings here were in fact a direct appeal under New York law. Finally, it would be manifestly inappropriate to apply such a distinction in this case -- where the precise constitutional violation was the denial of a direct appeal.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Mississippi should be reversed and the cause remanded with instructions that Petitioner be sentenced to a penalty less than death.

Dated: February 25, 1988
New York, New York

Respectfully submitted,
Robert M. Kaufman, President*
Jonathan Lang
Eric M. Freedman
THE ASSOCIATION OF THE BAR OF
THE CITY OF NEW YORK
42 West 44th Street
New York, New York 10036-6690
(212) 382-6600

Of Counsel:

Steven B. Rosenfeld
John P. Coffey (Awaiting Admission)
PAUL, WEISS, RIFKIND, WHARTON & GARRISON
1285 Avenue of the Americas
New York, New York 10019
(212) 373-3000

* Counsel of Record